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No. 01-1145

IN THE

Supreme Court of the United States

RITH ENERGY, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In a case claiming a regulatory taking of real property leases:

1. When there is a total prohibition on any further use of the leases, does the taking become non-categorical merely because the owner was able to make limited use of the leases prior to the taking?

If the taking is partial instead of categorical:

2. When the owner is prohibited from mining coal based on a statutory application which was unforeseeable, and never applied to any other miner in the state before or since, does the owner lack reasonable investment backed expectations solely because the statute existed before it acquired the leases?

3. Do various facts which show that the owner was treated in discriminatory and unfair ways, and which otherwise are relevant to several issues in a regulatory takings case, become irrelevant because the agency's permit denial is presumptively lawful?

4. Did the Court of Appeals misconceive the legal content of and misapply various factors relevant in a partial takings case, including the economic impact on the property owner and the character of the government's action?

PARTIES TO THE PROCEEDINGS

All parties to this proceeding in the United States Court of Appeals for the Federal Circuit are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Rith Energy, Inc., has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ..... (i)

PARTIES TO THE PROCEEDINGS ..... (ii)

CORPORATE DISCLOSURE STATEMENT ..... (ii)

TABLE OF CONTENTS ..... (iii)

TABLE OF CITED AUTHORITIES ..... (v)

TABLE OF APPENDICES ..... (viii)

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Introduction and Summary. 2

B. Water and Mining Acts. 3

C. Permitting Activities. 4

D. Rith Compared To Other Mines. 9

E. Administrative And Judicial Proceedings. 11

F. Trial Court Decisions. 12

G. Federal Circuit Decisions. 13

REASONS FOR GRANTING THE WRIT 15

I. THE RULING THAT THE TAKING WAS NOT CATEGORICAL WARRANTS REVIEW. 17

II. THE INVESTMENT BACKED EXPECTATIONS RULING WARRANTS REVIEW. 19

III. THE RULING THAT CLAIMS OF DISCRIMINATORY TREATMENT AND UNFAIRNESS CANNOT BE PRESENTED IN A CASE WHERE THE GOVERNMENT'S CONDUCT IS LAWFUL WARRANTS REVIEW. 21

IV. THE COURT OF APPEALS' APPLICATION OF OTHER *PENN CENTRAL* FACTORS WARRANTS REVIEW. 24

CONCLUSION 26

TABLE OF CITED AUTHORITIES

Cases: *Page*

Armstrong v. United States, 364 U.S. 40 (1960) 16

Babbitt v. Youpee, 519 U.S. 234 (1997) ..... passim

Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993) 18

Creppel v. United States, 41 F.3d 627 (CA Fed. 1994) .. 13

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 22

Good v. United States, 189 F.3d 1355 (CA Fed. 1999), *cert. denied*, 529 U.S.1053 (2000) 13

Hodel v. Irving, 481 U.S. 704 (1987) ..... passim

In re: Surface Mining Regulation Litigation, 627 F.2d 1346 (CA D.C. 1980) 22

Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987) 18

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 17

M & J Coal, Inc. v. United States, 47 F.3d. 1148 (CA Fed. 1995), *cert. denied*, 516 U.S. 808 13

Mitchell Arms v. United States, 7 F.3d 212 (CA Fed. 1993), *cert. denied*, 511 U.S. 1106 (1994) ... 20

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) .... passim

Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (CA Fed. 2000), *rehearing denied*, 231 F.3d 1365 ..... passim

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), ... passim

Tennessee v. Champion International Corp., 709 S.W.2d 569 (1986), *vacated on other grounds*, 479 U.S. 1061 (1987). 3

United States v. New River Collieries Co.,
262 U.S. 341 (1923) 18

United States v. Sioux Nation of Indians,
448 U.S. 371 (1980) 18

West Virginia Mining and Reclamation Ass'n v. Babbitt, 970 F.Supp. 506 (S.D.W.Va. 1997) 12

Statutes:

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1346(a)(2) 17
28 U.S.C. § 1491(a)(1) 12, 17
28 U.S.C. § 1631. 12
30 U.S.C. § 1201(e) 3
30 U.S.C. § 1202(f). 4
30 U.S.C. § 1256(a) 4
30 U.S.C. § 1257(b)(11) 4
30 U.S.C. § 1265(b) 4
30 U.S.C. § 1265(b)(10) 4
30 U.S.C. § 1265(b)(10)(A)(i) 4
30 U.S.C. § 1265(b)(10)(A)(ii) 4, 22
30 U.S.C. §1271(a). 8
30 U.S.C. § 1271(a)(2) 7, 14, 25
30 U.S.C. § 1271(a)(5) 7, 25
30 U.S.C. §1271 (c). 8
30 U.S.C. § 1292(a)(3) 22
33 U.S.C. § 1311(a). 3
33 U.S.C. § 1342(a)(1). 3
33 U.S.C. § 1342(b). 3
33 U.S.C. § 1342(c). 3

33 U.S.C. § 1342(k) 12

33 U.S.C. § 1370. 3

Tenn. Code § 66-5-101 21

Tenn. Code § 69-3-103(33) 3

Tenn. Code § 69-3-108(b)(1) 3

Tenn. Code § 69-3-114(a) 3

Federal Water Pollution Control Act,
33 U.S.C. §§ 1251 *et seq.* ..... passim

Surface Mining Control and Reclamation Act of 1977,
30 U.S.C. §§ 1201, *et seq.* ..... passim

Tennessee Water Quality Control Act of 1971,
Tenn. Code §§ 69-3-101, *et seq.* ..... passim

Regulations:

30 CFR § 715.14(j)(1) 4, 22

30 CFR § 715.17(g) 4, 22

30 CFR § 715.17(h) 4, 22

30 CFR § 780.21(e). 22

30 CFR § 816.41(b)(1). 22

30 CFR § 816.41(d)(1). 22

30 CFR § 843.12(a).. 8

30 CFR § 843.12(b).. 8

40 CFR 434.10 3

40 CFR 434.30, *et seq.* 22

40 CFR 434.30-35 3

45 FR 6913 (Jan. 30, 1980) 4, 22

50 FR 41305 (Oct. 9, 1985) 3

TABLE OF APPENDICES

Page

Appendix A – – Opinion of the United States Court of Appeals for the Federal Circuit Dated and Entered November 5, 2001 ..... 1a

Appendix B – – Notice of Entry of Judgment and Opinion of the United States Court of Appeals for the Federal Circuit Dated and Entered May 2, 2001 ..... 11a

Appendix C – – Opinion and Order of the United States Court of Federal Claims Dated and Filed July 14, 1999 ..... 28a

Appendix D – – Opinion of the United States Court of Federal Claims Dated and Filed June 25, 1999 ... 30a

Appendix E – – Opinion of the Interior Board of Land Appeals, dated October 24, 1989 ..... 46a

Appendix F – – Opinion and Decision, United States Department of the Interior, Office of Hearings and Appeals, Before an Administrative Law Judge, dated March 28, 1989 ..... 64a

Appendix G – – Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (2001):

33 U.S.C. 1311(a) 109a
33 U.S.C. 1342(a) 109a
33 U.S.C. 1342(b) 109a
33 U.S.C. 1342(c) 110a
33 U.S.C. 1342(k) 110a
33 U.S.C. 1370 ..... 111a

Appendix H – – Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 *et seq* (2001):

30 U.S.C. 1201(e) 112a
30 U.S.C. 1202(f) 112a
30 U.S.C. 1256(a) 112a
30 U.S.C. 1257(b) 112a
30 U.S.C. 1265(b) 113a
30 U.S.C. 1271(a) 114a
30 U.S.C. 1271(c) 115a
30 U.S.C. 1292(a) 116a

Appendix I – – Tennessee Water Quality Control Act of 1971, Tenn. Code §§ 69-3-101, et seq. (2001):

69-3-101 ..... 117a
69-3-103 ..... 117a
69-3-108 ..... 118a
69-3-114 ..... 118a

Appendix J – – Code of Federal Regulations:

30 CFR § 715.14(j)(1) 120a
30 CFR § 715.17(g) 122a
30 CFR § 715.17(h) 123a
30 CFR § 780.21(e). 124a
30 CFR § 816.41(b)(1). 125a
30 CFR § 816.41(d)(1). 125a
30 CFR § 843.12(a).. ..... 126a
30 CFR § 843.12(b).. ..... 126a
40 CFR 434.10 ..... 127a
40 CFR 434.30-35 ..... 127a

Appendix K – – Memorandum In Support of Plaintiff's Motion To Reconsider And Alter Or Amend Judgment, Dated and Served July 9, 1999 ... 131a

Appendix L – – Order, United States Court of Appeals
for the Federal Circuit, Dated and Filed
November 5, 2001 ..... 134a

PETITION FOR A WRIT OF CERTIORARI

Rith Energy, Inc. ("Rith") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The two opinions of the United States Court of Appeals for the Federal Circuit (App. 1a-27a)[1] are reported at 247 F.3d 1355 (CA Fed. 2001), and 270 F.3d 1347 (CA Fed. 2001). The two opinions of the United States Court of Federal Claims (App. 28a-45a) are reported at 44 Fed.Cl. 108 (1999), and 44 Fed.Cl. 370 (1999).

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on May 2, 2001 (App. 11a). A timely petition for rehearing was denied by order entered November 5, 2001 (App. 134a, 1a-2a, 10a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation."

The relevant provisions of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.;* the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, *et seq.;* regulations implementing both Acts; and the Tennessee Water Quality Control Act of 1971, Tenn. Code §§ 69-3-101, et seq., are reprinted in the Appendix at 109a-130a.

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[1] "App." references are to Appendices A to L, *infra*, pp. 1a-134a. "JA" references are to the Joint Appendix filed in the Court of Appeals. Petitioner has requested that the Clerk of the Court of Appeals send one copy of the Joint Appendix to this Court for lodging.

STATEMENT OF THE CASE

A. *Introduction and Summary.* After purchasing two coal mining leases in Tennessee, petitioner obtained a National Pollutant Discharge Elimination System ("NPDES") water discharge permit under the Federal Water Pollution Control Act, commonly called the "Clean Water Act," 33 U.S.C. §§ *1251 et seq.*, and a separate mining permit under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 *et seq.* (1988) ("SMCRA"). After Rith began mining, an elected official and certain citizens objected. In 1986 the Interior Department's Office of Surface Mining ("OSM") suspended petitioner's mining permit because its mine had the "potential" to generate Acid Mine Drainage ("AMD"). The suspension was administratively upheld on the ground that the federal mining act did not allow a miner to treat AMD before discharge, but instead prohibited mining which would result in the generation of AMD in the first instance. Rith never discharged any AMD from its site, and always complied with its NPDES water permit.

Petitioner was prohibited from mining on a ground which never was applied to any Tennessee miner before, and never has been successfully applied to any such miner since. AMD has been generated in Tennessee since the nineteenth century. In the mid to late 1980s numerous miners in Tennessee generated actual AMD, and discharged it in accordance with NPDES permits. OSM routinely granted them permits to mine. OSM also granted such permits after Rith's permit was denied. In 1997 OSM acknowledged, contrary to its position in Rith's case, that the mining act allows treatment of AMD during mining and reclamation. Throughout the 1980s, OSM recorded hundreds of violations of NPDES permits by miners, many for discharging AMD in excess of permit limits. OSM never revoked or suspended the mining permits of any of these violators. Unlike these polluters, petitioner always complied with its NPDES permits.

The Court of Appeals ruled that the taking was not categorical; and that petitioner could not recover for a partial

taking because it was subjected to a lawful application of a statute which pre-dated its acquisition of title, and therefore lacked reasonable investment backed expectations. The Federal Circuit also ruled that various of petitioner's fairness arguments – – including that it was subjected to an unforeseeable and discriminatory application of the mining statute -- – were irrelevant because the permit denial was lawful.

B. *Water and Mining Acts.* The Clean Water Act, as amended in 1972, prohibits "the discharge of any pollutant by any person" except in compliance with the Act, *id.* § 1311(a), and provides for the issuance of NPDES permits to discharge pollutants, *id.*, § 1342(a)(1). In 1985 the Environmental Protection Agency ("EPA") promulgated regulations under the Clean Water Act applicable specifically to coal mines, which impose precise limitations on the discharge of AMD. 40 CFR 434.10, 30-35, 50 FR 41305 (Oct. 9, 1985).

The NPDES permit program may be administered by the States, which may pass state laws which are more, but not less, stringent than the federal statute. 33 U.S.C. §§ 1342(b)-(c), 1370. At all relevant times, Tennessee issued NPDES permits under its own statute.[2] The Tennessee Water Quality Control Act of 1971, as amended, Tenn. Code §§ 69-3-101, et seq. ("State Act"), makes it unlawful "[t]o discharge any substance into the waters of the state . . . unless such action has been properly authorized, *id.* § 69-3-114(a), or to alter "the properties of any waters" of the State "except in accordance with the conditions of a valid permit." *Id.* § 69-3-108(b)(1). The State Act defines "waters" to include "all water . . . on or beneath the surface of the ground. . . ." § 69-3-103(33).

In SMCRA, enacted in 1977, Congress sought to "minimize so far as practicable the adverse . . . environmental effects of . . . mining operations;" 30 U.S.C. § 1201(e), while

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[2] *See Tennessee v. Champion International Corp.*, 709 S.W.2d 569, 574 (1986), *vacated on other grounds*, 479 U.S. 1061 (1987).

"strik[ing] a balance between protection of the environment . . . and the Nation's need for coal as an essential source of energy," *id.*, § 1202(f).

SMCRA requires a permit to mine. *Id.* § 1256(a). A permit application must contain, *inter alia,* a determination of the probable hydrologic consequences of the mining and data relevant to that determination. *Id.* § 1257(b)(11). With respect to AMD, 30 U.S.C. § 1265(b) provides that "[g]eneral performance standards shall . . . require the operation as (sic) a minimum to ----- (10) minimize the disturbances to the prevailing hydrologic balance . . . by ----- (A) avoiding acid or other toxic mine drainage." Section 1265(b)(10)(A) requires AMD to be avoided by such measures as "(i) preventing or removing water from contact with toxic producing deposits" and/or "(ii) treating drainage to reduce toxic content." By 1980 OSM published regulations which required miners to minimize the adverse effects of AMD, and bury toxic materials under at least 4 feet of non-toxic material. 30 CFR 715.17(g)-(h), 715.14(j)(1), 45 FR 6913 (Jan. 30, 1980). They did not prohibit mining at sites with toxic materials, or the potential to produce AMD.

C. *Permitting Activities.* AMD occurs when iron and sulfur containing materials in the overburden (*i.e.*, the materials above the coal seam) combine with air and water to produce a chemical reaction (JA 281). AMD has been prevalent in Tennessee since coal mining began there in the nineteenth century (JA 311-12, 284).

As of the mid to late 1980s, numerous mines in Tennessee produced AMD. Some of these were large mines not far from Rith's site (JA 292, 296, 301, 306, 315-16). They treated the AMD prior to discharge in accordance with NPDES permits (JA 314, 367; *see* JA 193). Each of these mines

continues to create AMD today,[3] and treat the AMD prior to discharge from the property. Each continues mining today pursuant to mining permits issued by OSM (JA 315-16, 367).

In 1985 East Texas Energy owned a coal lease, and had nearly completed a mining permit application. It was prepared by T.C. Miller, the principal engineer and president of a mining consulting firm (JA 310). Miller advised petitioner that mining conditions on the East Texas property were favorable, and that no difficulties were expected in obtaining mining permits (JA 310-11, 349, 362). In June 1985, based in part on Miller's recommendation, petitioner assumed the partially completed East Texas permit application (JA 349, 363), and acquired for $35,000.00 both the East Texas lease, and the lease for a contiguous property, which together covered about 250 acres of land (JA 109-11, 112-14). The leases required petitioner to pay a production royalty of between $2.00 and $2.50 per ton of coal mined (JA 80, 91, 109-11, 112). One lease provided that in case of "force majeure," which included "unforeseeable events . . . such as . . . acts of God . . . [or] inability to obtain necessary permits or licenses," the lessee's obligations would terminate (JA 83). The other Lease provided that the "Lessors make no representations . . . of the quantity, quality, or capability of removal of coal, the same being a business risk . . . assumed by Lessee" (JA 90).

To begin mining, Rith needed both NPDES and SMCRA permits. In January 1986 the Tennessee Division of Water Quality Control granted petitioner a five year NPDES permit (JA 169, 344; *see* JA 311, 351, 343). It sets forth specific limits on the contents of the water petitioner could discharge from surface of the site (JA 171, 344). It contains no limitations on underground seepage from the area mined (JA 344, 169-187).

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[3] "Today" means 1997 when the factual record in the Trial Court was created.

In August 1985, petitioner applied to OSM for a permit to strip mine approximately 89 acres of the leased property. Petitioner intended to begin mining this acreage, and later amend the application to include additional acreage as the mining progressed (JA 350). The application contained a "generic" Toxic Materials Handling Plan of the kind frequently found in Tennessee permit applications (JA 312, 350, 122). It also indicated that petitioner would monitor water in underground wells at periodic intervals (JA 345).

OSM reviewed the application "thoroughly" and "with special care" (JA 192). In January 1986, OSM issued petitioner a five year SMCRA permit to mine (JA 163, 350). The permit allowed petitioner to treat AMD generated during mining by passing it through sediment ponds prior to discharge from the property (JA 164 (Sec. 2), 311, 193). However, as is typical, the permit does not specify or limit the amounts of AMD which can be produced by mining, discharged from the property, or allowed to seep into the ground (JA 163-66, 345). Promptly after receiving the NPDES and SMCRA permits, petitioner began mining (JA 350-51).

Around January 1986 Save Our Cumberland Mountains ("SOCM"), an environmental organization, complained to OSM about petitioner's mining (JA 351). OSM advised SOCM that these complaints lacked merit (JA 153, 167, 189, 190, 191). Thereafter, SOCM's President organized a letter writing campaign to various elected officials (JA 197-201). As a result, Senator Albert Gore, Jr. wrote OSM expressing the concerns of his constituents regarding the Rith mine (JA 203). In March 1986, following these communications, OSM decided to conduct a group tour to re-sample the overburden from the Rith permit area (JA 313, 351, 205). The alleged purpose of the re-sampling was to reassess the mine's potential to produce AMD in the future (JA 351). At that time, the Rith mine had neither produced nor discharged any AMD (JA 315, 353).

Before the group tour, OSM made site visits which gave it no reason to question the data petitioner submitted with the

permit application. OSM also examined the overburden and water, and found it not to be acidic or toxic, and found no AMD problems (JA 195, 366-67). Because of numerous citizen complaints, OSM inspected petitioner's site much more frequently than others (JA 366-67).

During the group tour an OSM geologist took samples from the mine site (JA 205, 365). There is an unresolved factual dispute between the parties as to the nature and import of these samples. In OSM's view, these samples showed pH levels 250% more acidic than, and had a 500% neutralization variance from, petitioner's earlier samples (JA 12). Based on its samples, OSM determined that petitioner's mine had the "potential" for AMD in the future (JA 205). Miller, petitioner's consultant, stated in a declaration that the samples were not taken in the normal manner, but instead were "hand picked biased samples" which would exhibit the most potential for AMD (JA 313).

On June 1986, without any notice or warning or a hearing, OSM "temporarily suspended" petitioner's mining permit (JA 219). The suspension was not based on any findings or allegations that petitioner violated any of the terms of its mining or NPDES permits, or created any AMD (JA 219). OSM issued the suspension because petitioner's mine had the "potential" to produce AMD (JA 352, 219).

30 U.S.C. § 1271(a)(2) provides that whenever a violation of SMCRA may cause "imminent" environmental harm, OSM shall "immediately" order a cessation of the offending mining. Such orders must describe the violation with "reasonable specificity," and automatically expire within thirty days unless a public hearing is held. *Id.* § 1271(a)(5). OSM did not make any findings of "imminent" harm, issued no orders which would expire in thirty days, and did not invoke § 1271(a)(2).

OSM enforces other applicable legal requirements and permit terms by issuing a Notice of Violation ("NOV") and, if the violation is not corrected, a Cessation Order ("CO"). If a CO is not obeyed, OSM imposes a series of fines and other sanctions.

30 U.S.C. §1271(a) and (c). OSM's regulations provide that, if there are non-imminent dangers or harms resulting from SMCRA violations, OSM shall issue a NOV fixing a reasonable time for abatement. 30 CFR §§ 843.12(a)-(b). OSM did not issue any NOVs or COs to petitioner regarding potential AMD (JA 353), and could not do so because petitioner was not violating its permit terms, or SMCRA or implementing regulations as then applied.

When OSM suspended the permit in June 1986, it wrote that petitioner could resume mining if OSM made a "finding that there will be no adverse impact to the hydrologic balance" (JA 219). OSM made that finding before the permit was granted (JA 161-62, 160g). In December 1986, months *after* the suspension, OSM again found that petitioner's mine was "designed to prevent material damage to the hydrologic balance" (JA 231). However, despite the finding, OSM did not allow petitioner to resume mining.

OSM later made explicit that it would not approve a Toxic Materials Handling Plan ("TMHP") which would allow Petitioner to treat any AMD which might be formed before discharge (even if all treated discharges met NPDES permit limits) (JA 354, 234). Instead, OSM required petitioner to propose a TMHP which would use impermeable pods to completely isolate toxic and acid producing material so that no AMD would be created (JA 324, 327, 316-17). OSM had never before required such a TMHP of a permit applicant (JA 316-17). In November 1987 OSM acknowledged that, while it would not approve a permit revision unless petitioner came up with such a TMHP (JA 237), OSM was "not aware of any plan that is guaranteed to work" (JA 239).

Petitioner requested that OSM's Pittsburgh, Pennsylvania office ("OSM Pittsburgh") assist in the development of a TMHP (JA 315, 355). While touring the mine in November 1987, one OSM Pittsburgh official stated:

"[J]ust what in the hell is wrong at this mine site because

> I can't see nothing and we have a hundred bigger sites with a thousand times more problems than this site will ever have!" [JA 355].

Another OSM official responded: "SOCM is interceding in this permit" (JA 355-56; see also JA 356). In December 1987, OSM Pittsburgh officials were of the opinion that "the toxic-forming material [at Rith's site] can be handled easily and in a straight forward fashion" (JA 244-45).

At petitioner's request, OSM Pittsburgh developed a new TMHP for the Rith site, and petitioner submitted the TMHP developed by OSM Pittsburgh to OSM Knoxville (JA 315, 356). In September 1988 OSM Knoxville issued a final decision denying petitioner's Significant Revision No. 10 (JA 274, 315). The TMHP OSM Knoxville required of petitioner, even if technically feasible, would have increased petitioner's mining costs above the price for which it could sell the coal (JA 316). For this reason, OSM's requirement had the effect of preventing petitioner from mining any coal under its leases (JA 353-54).

D. *Rith Compared To Other Mines.* No actual AMD was produced at any time while petitioner was mining the property. OSM's suspension was based on the mine's *potential* to produce AMD (JA 219, 314, 352). As of the mid 1980s, numerous mines in Tennessee were producing actual AMD. OSM did not suspend any of these permits, and continued to issue further permits for these mines (JA 315-16, 367, 25-26). Before petitioner, no other permit applicant ever was required to submit a TMHP of the kind OSM required of Rith (which would prevent AMD formation by using impermeable pods to completely isolate toxic materials) in order to obtain a permit (JA 316-17, 26). When reviewing Petitioner's permit, OSM knew of no other mine anywhere where such a TMHP was used (JA 20).

In the Trial Court, petitioner's mining consultant submitted a declaration stating that, to the best of his knowledge, to this day no mining permit in Tennessee other than petitioner's has been suspended because of potential AMD, and no other

miner has been required to use a TMHP of the kind OSM required of Petitioner (JA 316-17). Despite ample opportunity, respondent has been unable to identify any other instance in the history of Tennessee mining when a permit was denied because of the potential for AMD, or on the ground that SMCRA prevented the mere formation of AMD during mining.

In early June 1986, after the group tour, the State conducted an NPDES compliance inspection, and concluded that petitioner was operating within the terms of its NPDES permit (JA 207-08). In 1987, well after OSM suspended petitioner's permit, a State official visited the site to investigate citizen concerns (JA 347, 232). He concluded that an AMD reaction was "difficult to project" (JA 233), and recommended no additional monitoring wells to protect human health or the environment since "residents are very unlikely to experience groundwater contamination" (JA 234).

Petitioner's five year NPDES permit remained in effect until 1991, when petitioner received another NPDES permit from the State (JA 315, 357, 345). The only time any AMD appeared on the property was in 1993, after a heavy rainfall, when a small amount of AMD appeared at a point prior to entering the sediment pond (JA 369). That AMD was not discharged (JA 317, 369). The sediment pond was designed to treat any AMD before discharge (JA 319). Petitioner never discharged any AMD, and always met all NPDES standards required by law (JA 315, 357, 367).

Between 1984 and 1991 OSM recorded 566 violations of NPDES permit limits by miners (JA 253-61, 276-79). These violations were for either toxic waste, or for discharging AMD in excess of permit limits (JA 253). None of these miners suffered a mining permit suspension or revocation because of excess AMD discharges, or even for toxic waste violations. To this day, petitioner has never discharged AMD in violation of its NPDES permit limits (or had any toxic waste violations) (JA 315, 357, 367).

In July 1991, an OSM employee stated to Petitioner, "you got screwed with your permit by us, very unfair" (JA 357). In March 1992, another OSM employee stated that there was "better water on [Rith's] site than we drink out of in our office" (JA 357). An OSM inspector stated that Petitioner definitely was treated differently from various other Tennessee miners (JA 366-67).

When petitioner initially acquired its leases, the 250 acres contained about 385,000 tons of minable coal (JA 350). Before the permit denial, petitioner mined about 35,000 tons, or about 9% of the total, leaving some 350,000 tons, or 91% of the total, unmined (JA 317; App. 20a, 3a). Petitioner's investors made a profit of about $500,000.00 on the 9% of the coal they mined, and expected to make a similar profit per ton on the remaining 91% of the coal (App. 20a; JA 352-53, 363).

E. *Administrative And Judicial Proceedings.* Petitioner administratively appealed the permit denial. After an evidentiary hearing, an Administrative Law Judge ("ALJ") ruled that petitioner did not show it could accomplish the post-mining reclamation required by SMCRA (App. 103a-104a). The ALJ also ruled that petitioner could not prove its mine would not damage the hydrologic balance (App. 104a-106a). The ALJ found a "high probability [of AMD seepage] into the Sewanee Conglomerate aquifer" below the coal seam (App. 106a).

In 1989, the Interior Board of Land Appeals ("IBLA") affirmed. It stated that the present absence of any AMD "does not mean that acid mine drainage will not occur in the future" (App. 60a). The IBLA ruled that SMCRA does not allow miners to treat AMD before discharge, but instead prohibits the formation of AMD in the first place. Its ultimate ruling was that SMCRA, as applied in this case, required not merely minimizing the contact of water and toxic-producing deposits, but "*avoiding* acid or toxic mine drainage." (App. 62a; emphasis supplied).

In *West Virginia Mining and Reclamation Ass'n v. Babbitt,* 970 F.Supp. 506 (S.D.W.Va. 1997), decided some eight years after the IBLA's decision, OSM conceded that SMCRA allows treatment of AMD, rather than complete "avoidance," during both mining and reclamation. *Id.* at 515, 517-18. OSM has not cited a single case in SMCRA's 24 year history (other than this one) where it succeeded in denying a permit because of AMD potential.

F. *Trial Court Decisions.* In 1988 and 1989 petitioner brought three suits in the United States District Court for the Eastern District of Tennessee seeking various forms of relief. All of petitioner's claims, except for the takings claim, were dismissed without a ruling on the merits (JA 17a, 38a-39a). One suit was transferred to the United States Claims Court (now the United States Court of Federal Claims ("Trial Court")) under 28 U.S.C. § 1631. The Trial Court had jurisdiction over petitioner's regulatory takings claim under 28 U.S.C. § 1491(a)(1).

The Trial Court (per Judge Wiese) decided the takings claim on cross motions for summary judgment. It entered judgment for respondent, ruling that the high probability of AMD seepage into the Sewanee aquifer was a public, statutory nuisance because it was prohibited by the State Water Quality Act (Add. 41a). The Court rejected petitioner's argument that it was always complying with the State Act and its NPDES permit. It ruled, *sua sponte,* that if only State officials had been informed of the high probability of harm to the Sewanee aquifer, they would have "reexamine[d] the validity of the permit they initially had issued" (App. 44a). Rith petitioned for reconsideration on the grounds that it made full disclosure of all information requested when applying for its NPDES permit; that it always complied with its NPDES permits; and that under the Clean Water Act, 33 U.S.C. § 1342(k), compliance with an NPDES permit is deemed compliance with relevant provisions of that Act (App. 131a-133a). Without addressing petitioner's arguments, the Trial Court denied reconsideration, and ruled

that the mine also was a common law nuisance (App. 28a-29a).

G. *Federal Circuit Decisions.* The Federal Circuit affirmed, but on different grounds. Judge Bryson wrote for himself, Chief Judge Mayer, and Judge Lourie. At the outset, the Court of Appeals addressed the question whether the claimed taking was categorical (prohibiting "all economically viable use") or partial (prohibiting some use but "leav[ing] the owner with substantial viable economic use") (App. 19a-20a). It concluded that the taking was not categorical, even though petitioner was prohibited from making any use of its leases after the final permit denial in September 1988. It reasoned that the impact of OSM's action should be measured by looking at the extent of petitioner's ability to use its leases throughout the permitting process (App. 21a), and that petitioner was able to mine a significant amount of coal that earned it a substantial profit (App. 22a).

The Federal Circuit noted that, under its prior decisions, the consequence of concluding that the taking was not categorical is that "Rith must show that it had a reasonable investment-backed expectation that it would not be subject to [OSM's regulatory] restraints when it acquired the coal leases" (App. 23a). That court relied on its earlier decisions denying compensation for takings for lack of investment backed expectations (App. 23a-24a). *See Palm Beach Isles Assocs. v. United States,* 208 F.3d 1374, 1379 (CA Fed. 2000), *rehearing denied,* 231 F.3d 1365 (to recover for non-categorical taking, owner must show it "had distinct investment backed expectations"); *Good v. United States,* 189 F.3d 1355, 1360-62 (CA Fed. 1999), *cert. denied,* 529 U.S. 1053 (2000) (reasonable expectations required in "every regulatory takings case;" and no reasonable expectations because owner "had both constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property"); *M & J Coal, Inc. v. United States,* 47 F.3d. 1148, 1154 (CA Fed. 1995), *cert. denied,* 516 U.S. 808 (any state authorization to mine is subordinate to national public health and safety standards of SMCRA); and *Creppel v. United States,* 41 F.3d

627, 632 (CA Fed. 1994) (one who buys with knowledge of regulatory restrictions assumes risk of economic loss; compensating him would confer windfall). The Federal Circuit noted that, although OSM did not invoke 30 U.S.C. § 1271(a)(2), which allows OSM to suspend mining when there is "an imminent danger to the health or safety of the public," that was the apparent source of its authority to issue the suspension order (App. 24a). It held that Rith "could not reasonably have expected that it would not be required to adopt potentially expensive measures to avoid [AMD] if OSM determined that its mining activities could result in the release of" AMD (App. 23a), or because there was a high probability that there would be AMD into the Sewanee aquifer (App. 24a).

In the Court of Appeals, petitioner argued that its investment expectations were reasonable because it was subjected to an application of SMCRA which was unforeseeable, prohibitively expensive, and discriminatorily applied to petitioner alone.[4] The Court of Appeals did not address this argument. Instead, it incorrectly characterized the argument as a challenge to the lawfulness of OSM's permit denial, and rejected that argument (App. 25a-26a).

After this Court decided *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), Rith petitioned for rehearing and rehearing en banc. Rith argued that, if the taking was only partial, investment backed expectations was not a requirement, but instead one of several factors to be considered; that Rith had reasonable expectations; and that the nature of OSM's actions supported the conclusion there was a taking. The Court of Appeals ruled that *Palazzolo* did not provide a reason for altering the Federal Circuit's earlier conclusion that petitioner lacked reasonable investment expectations (App. 2a, 5a-8a). The Court of Appeals stated that, although OSM's action deprived petitioner of the ability to mine about 91% of the coal it leased, petitioner still was able to make a substantial profit in light of the price paid (App.

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[4] Appellant's Opening Br., pp. 47-56; Rep.Br. pp. 5-10.

3a, 8a-9a). It also ruled that OSM's action was an exercise of the police power which typically does not require compensation (App. 9a). Finally, the Federal Circuit ruled that Rith's various claims of discriminatory treatment, political pressure, and related matters were not relevant to the takings analysis. It ruled that those claims should have been, or were, raised in the prior administrative or judicial proceedings, and "are therefore not properly presented in the context of [Rith's] takings claim" (App. 10a). The Court of Appeals denied rehearing, and no judge voted for rehearing en banc (App. 134a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided several important questions of takings law which warrant review.

The Court of Appeals' ruling that the taking here was partial instead of categorical is unsound. It is undisputed that when OSM finally denied a permit, petitioner's entire leases became worthless. Whether a taking is categorical should be measured by the impact on the property at the time of the taking, not uses made of it before then, and the fact that petitioner was able to mine 9% of its coal before the taking should be irrelevant. Prior decisions by the Court on this "denominator" question focus on the restraint's impact on the property existing at the time of the taking, not uses made of it before then. This case presents a suitable vehicle for the Court to provide further guidance on this recurring question.

The Federal Circuit's rulings on why petitioner could not recover for a partial taking are far reaching and unsound. This Court has made clear that in a partial takings case, where the multi-factor *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), analysis applies, investment backed expectations is not a requirement which an owner must meet, but instead one of several relevant factors for consideration. In both *Hodel v. Irving,* 481 U.S. 704 (1987), and *Babbitt v. Youpee,* 519 U.S. 234 (1997), the Court held there was a partial taking, even though the owners showed no investment expectations.

Under *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), it is clear that the fact that an owner acquired title after a statutory scheme is passed cannot, by itself, defeat a partial takings claim, and is at most one factor for consideration. And the Court frequently has noted that considerations of "'fairness and justice,'" *e.g., Penn Central,* 438 U.S. at 123-124, quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960), play a large role in a takings analysis.

The Federal Circuit disregarded these decisions. Its ruling that investment expectations is a requirement, instead of one factor for consideration, is inconsistent with *Irving* and *Youpee.* Its ruling that petitioner could not have investment expectations unless it showed "that it would not be subject to [OSM's regulatory] restraints when it acquired" its leases (App. 3a) is equally mistaken. No owner acquiring after a statutory scheme is in place could make this showing if it was subject to a lawful application of the statute. The Federal Circuit's ruling that Rith's claims of discriminatory treatment and unfairness could not be raised in a takings case is quite far reaching and should not be allowed to stand (App. 10a). These rulings, taken together, mean that no owner can recover when it is subjected to a lawful application of a pre-existing statute, no matter how objectively reasonable its expectations had been, or how unfair that outcome might be. This result cannot be reconciled with fundamental aspects of this Court's takings jurisprudence, and presents important questions which should be reviewed.

The Federal Circuit's application of other *Penn Central* factors also warrants review. One factor is the economic impact on the owner. Although OSM's regulation wiped out 91% of the property petitioner initially purchased, the Federal Circuit gave that fact virtually no weight. The Federal Circuit's justification of OSM's action in this case as an exercise of the police power which requires no compensation, also is unsound. It is, to put it mildly, a curious exercise of the police power to prevent a miner from conducting an operation which is in full compliance with the stringent provisions of the State Water Act, and the provisions

of SMCRA as it has been applied in every case but this one. This Court should review the decision below to determine whether it conflicts with this Court's takings jurisprudence, and to provide further guidance to lower courts called upon to apply the multiple *Penn Central* factors.

This decision is from the Circuit in which all takings claims for more than $10,000 against the United States must be brought. 28 U.S.C. §§ 1346(a)(2); 1491(a)(1). If allowed to stand, it will make it extremely difficult – – if not impossible – – for any owner who obtained title after a statute is passed to recover for a partial taking.

I. THE RULING THAT THE TAKING WAS NOT CATEGORICAL WARRANTS REVIEW.

Under the current state of the Court's takings decisions, it often is important to determine at the outset whether the claimed taking is categorical, because all economically beneficial use of the land has been denied, or partial, because some beneficial use remains. Where the taking is categorical, the government's defenses are limited, and the owner's investment expectations are irrelevant. *Palazzolo,* 533 U.S. at 607. If the taking is partial, then the *Penn Central* analysis applies, and a court considers factors including the economic effect on the landowner, the extent of interference with investment backed expectations, and the character of the government action. *Id.*

To determine whether a taking is total or partial the Court must define the property interest against which the loss of value is to be measured. This is the "denominator" problem. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016 n. 7 (1992). While before OSM's permit denial petitioner was able to mine some 35,700 tons of the 385,000 tons initially on its land (about 9% of the total) , at the time of that denial the remaining value of Rith's leases became worthless. The relevant property interest in a case like this should be the property existing at the time of the taking. In other words, the "denominator" should be the 350,000 tons existing when the

permit was denied, and not the 385,000 tons Rith leased initially.

Although this Court has not provided precise guidance on how this issue should be resolved, it has addressed the issue by focusing on the property existing at the time of the taking, not uses made of it before then. *See Keystone Bituminous Coal Ass'n. v. DeBenedictis,* 480 U.S. 470, 497 (1987) (inquiry requires a comparison of "the value that has been taken from the property with the value that remains in the property");and *Penn Central,* 438 U.S. at 130 (comparing use prohibited with "value of the remainder of the[] parcel"). *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust,* 508 U.S. 602, 643-44 (1993) (parcel "could not first be divided into what was taken and what was left" to show the taking of the latter was complete), upon which the Federal Circuit relied (App. 21a), is not inconsistent with Rith's position. Petitioner's argument is that, at the time of the taking, everything was taken, and nothing was left, so the taking is categorical.

Contrary to the view of the Court of Appeals (App. 21a-22a), the fact that Rith was able to make a $500,000.00 profit before it was barred from mining should have no bearing on whether the taking was categorical. The significant fact is that the lease was worth several million dollars when OSM prohibited mining. The measure of compensation in a takings case is the value of the property at the time of the taking, *see United States v. Sioux Nation of Indians,* 448 U.S. 371, 387 n. 17 (1980), and whether the owner made a profit before then is usually irrelevant to that determination, *United States v. New River Collieries Co.,* 262 U.S. 341, 344 (1923) (owner's cost, or profit or loss, immaterial when it does not show market value). The same principle should apply when determining whether a taking is categorical. To illustrate, suppose Congress passed a law effective today prohibiting the General Electric Co. or Microsoft Corp. from hereafter transacting any business anywhere. That would be a total taking, and would not become partial because both corporations have been extremely

profitable to date. Nor would the taking become partial if Congress delayed the effective date of the statute for a few months.

The Court should grant certiorari to provide lower courts with further guidance on how to determine whether a taking is categorical.

II. THE INVESTMENT BACKED EXPECTATIONS RULING WARRANTS REVIEW.

A. If the taking is partial, then the degree of interference with the owner's reasonable investment backed expectations is relevant. *E.g., Palazzolo, supra,* 533 U.S. at 607. However, this Court has made clear that, while investment expectations is a relevant consideration in a partial takings case, it is not a requirement an owner must meet. *Hodel v. Irving, supra,* involved a federal statute barring certain Native American owners of small interests in land from passing the property on to their heirs by will or intestate succession. The taking was partial, because the owners were free to sell or use their interests in any way before death. 481 U.S. at 715. *Irving* applied *Penn Central, id.* at 717, and concluded that the owners' investment expectations were dubious and unproven, *id.* at 715, but held there was a taking. *Babbitt v. Youpee, supra,* addressed later legislation on the subject. The Court again agreed that investment expectations were not implicated, 519 U.S. at 239, but ruled there was a taking. There can be no requirement of proving investment expectations if a plaintiff can win without showing any.

In its rehearing petition, in connection with its argument that investment expectations is not a requirement in a takings case, Rith emphasized the holdings of *Irving* and *Youpee.*[5] Justice O'Connor's concurring opinion in *Palazzolo* (533 U.S. at 618), upon which the Federal Circuit relied in denying rehearing

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[5] Appellant's Combined Petition for Rehearing and Rehearing En Banc, filed July 5, 2001, pp. 1, 8.

(App. 6a), also noted the holding in *Irving*. Yet the Court of Appeals denied the petition without citing *Irving* and *Youpee* or addressing this argument. While it did not cite these decisions, it did deny rehearing based on "the precedents discussed in our original opinion, which we do not believe have been undermined by" *Palazzolo* (App. 10a). The Federal Circuit has given investment expectations an unduly important role in takings cases.

B. The Federal Circuit's definition of reasonable expectations for someone acquiring title after a statute is in place also warrants review. There is a big difference between (1) a rule, based on objective standards, and taking into account all factors relevant to real-world commercial transactions, that a plaintiff reasonably should have foreseen a regulatory result prohibiting the use of property, and (2) a rule that, once a statute is passed, anything goes, and a plaintiff's expectations become unreasonable even if the prohibition is unforeseeable, prohibitively expensive, and discriminatory. In ruling that petitioner could not show that its investment expectations were reasonable unless it showed "that it would not be subject to [OSM's regulatory] restraints when it acquired" its leases (App. 23a), the Court of Appeals effectively adopted the latter rule.

No owner acquiring title after a regulatory scheme is in place, and subject to a lawful application of the statute, could make this showing. By definition, whenever a permit is lawfully denied to such an owner, the denial will be based on a statute predating the acquisition of title. And under the law in the Federal Circuit, whenever an owner sues based on a permit denial the lawfulness of the agency's action must be presumed. *E.g., Mitchell Arms v. United States,* 7 F.3d 212, 215 (CA Fed. 1993), *cert. denied,* 511 U.S. 1106 (1994); and App. 10a. (If the permit denial is set aside as unlawful, then the owner will be able to mine or otherwise use the property). As a practical matter, under the standard applied by the Federal Circuit, very few owners purchasing after a statute is enacted could show reasonable investment expectations.

The Federal Circuit's view of what is required to show investment expectations is different from the Court's. Justice O'Connor's concurring opinion in *Palazzolo,* which the Federal Circuit cited for other purposes (App. 6a), explains that:

> "Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations." [533 U.S. at 618]

Under this view, it is clearly relevant that when petitioner acquired its leases (and was advised by its expert that getting a mining permit should be no problem) miners all over Tennessee were allowed to generate AMD provided it was treated before discharge, and petitioner was prohibited from mining on a ground never before applied in Tennessee.[6]

The Federal Circuit's investment expectations ruling goes much too far and should be reviewed.

III. THE RULING THAT CLAIMS OF DISCRIMINATORY TREATMENT AND UNFAIRNESS CANNOT BE PRESENTED IN A CASE WHERE THE GOVERNMENT'S CONDUCT IS LAWFUL WARRANTS REVIEW.

Throughout the proceedings in the Trial Court and the Court of Appeals, Rith claimed that it was subjected to an unforeseeable result, and treated unfairly in a variety of ways.

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[6] State law also gave petitioner reasonable expectations that it would have the same property rights as its predecessors in the chain of title. Tenn. Code Ann. § 66-5-101 long has provided that:

> "Every grant . . . of real estate, or any interest therein, shall pass all the estate or interest of the grantor . . ., unless the intent to pass a less estate or interest shall appear by express terms. . . ."

The Federal Circuit ruled that petitioner's discriminatory treatment and other arguments were unpersuasive and, in any event, are "not properly presented" in a takings case because the Court assumes the underlying governmental action is lawful and decides only whether there is a taking (App. 10a). This ruling severely, and improperly, limits the ability of a takings plaintiff to prove important parts of its case. It is fundamentally inconsistent with this Court's repeated indications that considerations of "fairness and justice" guide the takings analysis, and that it is essentially *ad hoc* and fact intensive. *Eastern Enterprises v. Apfel,* 524 U.S. 498, 523 (1998).

Petitioner stressed in the Court of Appeals various legal considerations which indicated that the result OSM reached was legally unforeseeable.[7] The Court of Appeals never addressed

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[7] For example, SMCRA permits a miner to use "such measures as . . . (ii) *treating* drainage to reduce toxic content . . . ." 30 U.S.C. § 1265(b)(10)(A)(ii) (emphasis added). It would make no sense to let miners "treat[]" AMD before discharge if Congress intended to prohibit the formation of any AMD in the first place. OSM's regulations applicable in 1986 -- and today -- clearly contemplate that mining under toxic material will be allowed if the adverse effects of AMD are minimized. *See* 30 CFR §§ 715.17(g)(1)-(6), (h)(1)-(4), 715.14(j)(1), 45 FR 6913 (Jan. 30, 1980). *See also* 30 CFR §§ 780.21(e), and 816.41(b)(1), (d)(1). OSM never has published regulations providing that mining with the potential for AMD is not allowed, or that AMD discharges complying with the Clean Water Act are banned.

SMCRA also provides that nothing in it shall be construed as modifying the Clean Water Act. 30 U.S.C. § 1292(a)(3). This was deemed an "absolute prohibition" against the Interior Department's promulgating rules any more stringent than the EPA's. *In re: Surface Mining Regulation Litigation,* 627 F.2d 1346, 1367 (CA D.C. 1980); and to the extent EPA regulations give miners any effluent limitation variances or exemptions, the Interior Department cannot take them away. *Id.* at 1366-69. The EPA promulgated regulations applicable specifically to miners which allow discharges of treated AMD. 40 CFR 434.30 et seq. The State, acting pursuant to these regulations and its own Water Quality Act, issued Rith an NPDES permit allowing the discharge of treated (fn. continued)

these considerations, presumably because of its view that they are "not properly presented" in a takings case (App. 10a). Petitioner stressed that it was prevented from mining through application of a legal standard – – no AMD could be formed at the mine site – – which never was successfully applied to a Tennessee miner before, or since. The Court of Appeals never addressed this, or other related facts. But surely, in determining what "expectations" are "reasonable," the legal landscape existing at the time the property was acquired, and whether the plaintiff was subjected to a discriminatory result, are highly relevant considerations.

The Court of Appeals' "not properly presented" ruling hamstrings takings plaintiffs on issues other than investment expectations. For example, petitioner noted that OSM had recorded more than 500 NPDES permit violations by miners for either excess AMD discharges, or toxic waste violations (JA 253-61, 275-79), and unlike Rith, which discharged no AMD, none of these polluters suffered a permit suspension or revocation. These facts undermine OSM's claim that it was acting in Rith's case to protect the environment, instead of for other reasons. According to one OSM official, the agency had "a hundred bigger sites with a thousand times more problems than this site will ever have" (JA 355). That surely is relevant to any "fairness" inquiry. This Court has noted that "spot zoning" *(i.e.,* zoning which treats one owner differently from others similarly situated) is far more likely to constitute a taking than even handed zoning. *E.g., Penn Central,* 438 U.S. at 132 and n. 28. Under the reasoning of the Court of Appeals it would seem that, so long as the spot-zoning was not overturned as unlawful, it could not be properly be used to prove a taking.

The above points are not a collateral attack on the administrative determination that the permit denial was lawful.

AMD. Petitioner could not foresee that in its case, despite 30 U.S.C. § 1292(a)(3), OSM would ban the treated AMD discharges which both the federal and state water statutes allow.

Petitioner does not dispute that it is bound by traditional issue preclusion principles. To the extent any specific issues were actually and necessarily litigated in the administrative proceedings, and collateral estoppel principles apply, petitioner is precluded from re-litigating those issues in this case. However, in a takings case petitioner should be allowed to rely upon any relevant factual or legal claim which it is not collaterally estopped from making. Otherwise, any agency decision to deny a permit which is not reversed on direct appeal will necessarily preclude a takings claimant from making fairness and other arguments in a takings suit.

The Federal Circuit's ruling on the effects of a presumption that the government's conduct is lawful will greatly narrow the rights of property owners, and should be reviewed.

IV. THE COURT OF APPEALS' APPLICATION OF OTHER *PENN CENTRAL* FACTORS WARRANTS REVIEW.

Aside from investment expectations, other *Penn Central* factors of particular importance are the economic effect on the landowner, and the character of the government action. *Penn Central, supra,* 438 U.S. at 124. The application of these factors in this case also warrants review.

Regarding the economic effect on the property owner, the Court of Appeals noted (App. 9a, 20a) that petitioner was able to make a substantial profit (*i.e.,* about $500,000.00) on its leases before its mining terminated, and that its initial investment consisted of a relatively small ($35,000.00) outlay. (Rith also had a much larger potential royalty obligation to the lessors, and of course the need for capital expenditures to do the mining).[8] The notion that an owner might lose his right to recover for a taking

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[8] If allowed to mine, petitioner would have paid the lessors some $800,000.00 in royalties (JA 80, 91, 350). A low initial purchase price with high royalties later is a reasonable way to structure a lease for a capital intensive mining operation.

merely because he previously made a profit, or because of the form of his obligation to the lessor, is unsound.

Far more relevant is the fact that OSM's action deprived petitioner of the ability to mine about 91% of the coal it leased (App. 3a, 8a-9a). A 91% reduction is, if not a total wipe-out, very close to it. Whenever a property interest has been reduced to so significant an extent, the scales should weigh heavily in favor of the property owner, and it should be able to prevail by making a lesser showing on the other *Penn Central* factors. *See generally Hodel v. Irving, supra,* 481 U.S. at 716-17 (taking away an owner's right to transfer at death property which he or she could fully use during life a serious impairment of property rights).

On the question of the character of the government action, the Federal Circuit's ruling that OSM's action was an exercise of the police power which typically does not require compensation (App. 9a) is far reaching, and unsound. For all the reasons stated above, OSM's actions and inactions are inconsistent with any proper exercise of the police power. Further, police power exercises should be defined by the terms and conditions of public laws and regulations, not the novel agency application involved here. OSM should not be permitted to claim the benefits of a statute authorizing it to prevent imminent environmental harm, when it fails to comply with or give an owner the benefits of that statute. As noted *supra,* pp. 7-8, if OSM invoked 30 U.S.C. §§ 1271 (a)(2), (5), it would have been required to specify the alleged violations of SMCRA, and hold a public hearing within thirty days or allow the mining to continue. When OSM suspended mining, it never gave petitioner notice of any claimed SMCRA violations, much less a hearing within thirty days.

This Court has "given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking." *Palazzolo,* 533 U.S. at 607. This case presents a suitable vehicle for giving lower courts more specific guidance on how certain *Penn Central* factors should be applied in a partial takings case. Under the *Penn Central* analysis, there was a taking here.

* * *

The Court of Appeals has failed to follow legal principles clearly set forth in this Court's decisions, and placed new roadblocks in the path of property owners seeking just compensation. If allowed to stand, its decision will make it extremely difficult for even the most deserving property owners who acquire title after a regulatory scheme is in place to recover from the United States.

CONCLUSION

Certiorari should be granted.

Respectfully Submitted,

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February 4, 2001

APPENDIX

Appendix A – – Opinion of the United States Court of Appeals for the Federal Circuit Dated and Entered November 5, 2001

RITH ENERGY, INC., Plaintiff-Appellant, v. UNITED STATES, Defendant-Appellee. 99-5153

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

270 F.3d 1347; 2001 U.S. App. LEXIS 25140

November 5, 2001, Decided

PRIOR HISTORY: Appealed from: United States Court of Federal Claims. Judge John P. Wiese.

Original Opinion of May 2, 2001, Reported at: *247 F.3d 1355, 2001 U.S. App. LEXIS 7986.*

COUNSEL: Raymond D. Battocchi, Gabeler, Battocchi & Griggs LLC, of McLean, Virginia, filed a combined petition for panel rehearing and rehearing en banc for plaintiff-appellant. With him on the brief were John R. Powell and Vicki A. Paisley. Of counsel on the brief was Walter H. Fleischer, of Washington, DC.

Katherine J. Barton, Attorney, Environmental and Natural Resources Division, Department of Justice, of Washington, DC, filed a response for defendant-appellee. With her on the brief was Susan V. Cook, Attorney. Of counsel on the brief was Thomas A. Bovard, Attorney, Office of the Solicitor, Department of the Interior, of Washington, DC.

Glenn Sugameli, Senior Counsel, National Wildlife Federation, of Washington, DC, for amicus curiae National Wildlife Federation.

Nancie G. Marzulla, Defenders of Property Rights, of Washington, DC, for amicus curiae National Mining Association.

JUDGES: Before MAYER, Chief Judge, LOURIE, and BRYSON, Circuit Judges.

OPINIONBY: BRYSON

OPINION: ON PETITION FOR REHEARING

BRYSON, Circuit Judge.

Appellant Rith Energy, Inc., has filed a petition for rehearing. The petition focuses principally on the Supreme Court's decision in *Palazzolo v. Rhode Island, 150 L. Ed. 2d 592, 121 S. Ct. 2448 (2001),* a case that was decided two months after the opinion in this case issued. Rith contends that Palazzolo is contrary to the analysis in our opinion and requires that the judgment be changed. We disagree. As we read Palazzolo, it is not inconsistent with either the judgment or the analysis in our opinion. We therefore deny the petition for rehearing.

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Rith first challenges our conclusion that the asserted taking in this case was not categorical. We reached that conclusion after noting that the suspension and subsequent revocation of Rith's mining permit did not deprive Rith of all value in its coal leases, since Rith was able to mine approximately 35,700 tons of coal from the lease area, or about nine percent of what it hoped to mine if its mining permit had not been suspended and ultimately revoked. Rith

suggests that the 91 percent reduction in the amount of the coal that it expected to mine "has wiped out virtually all of the property's value" and that the resultant taking, "if not complete, [is] very close to it."

As to whether the claimed 91 percent reduction in the amount of coal Rith has been allowed to mine constitutes a categorical taking of Rith's property under its coal leases, Palazzolo is distinctly unhelpful to Rith. The Supreme Court held that because Mr. Palazzolo retained some economic value in the regulated property, the denial of a building permit in Mr. Palazzolo's case did not constitute a categorical taking. In particular, the Court accepted the state court's finding that Mr. Palazzolo's property retained $200,000 in development value under the state's wetlands regulation, as contrasted with Mr. Palazzolo's estimate that the investment value of the property absent the wetlands regulations would be approximately $3,185,000. Although the value remaining in the property after the regulatory action was only about six percent of the value that Mr. Palazzolo expected to derive from the project, the Court ruled that the remaining value was not "a token interest" that left the property "economically idle." *121 S. Ct. at 2464, 2465.* The Court therefore rejected Mr. Palazzolo's argument that he suffered a total, or categorical, taking.

The Court's ruling on that point is consistent with earlier Supreme Court decisions in which the Court has held that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 645, 124 L. Ed. 2d 539, 113 S. Ct. 2264 (1993),* citing *Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384, 71 L. Ed. 303, 47 S. Ct. 114 (1926)* (approximately 75% diminution in value), and *Hadacheck v. Sebastian, 239 U.S. 394, 405, 60 L. Ed. 348, 36 S. Ct. 143 (1915)* (92.5% diminution); see also *Lucas v. South*

Carolina Coastal Council, 505 U.S. 1003, 1019-20 n.8, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) (suggesting that a 95% diminution in value would not constitute a categorical taking).

The same principle applies here, where the percentage value remaining to Rith despite the regulatory action was greater than the percentage value remaining to Mr. Palazzolo. The diminution in the value of the coal lease therefore does not, by itself, establish a categorical taking.

In support of its contention that the asserted taking in this case was categorical, Rith argues that the amount of coal that it was permitted to mine during the time its permit was in effect is irrelevant. According to Rith, the nature of the taking must be measured by the economic value remaining in the coal leases at the time the permit was revoked. Because the revocation of the permit prevented Rith from taking any more coal from the leased property, Rith argues that the permit revocation deprived it of all of its remaining property, i.e., 100 percent of the coal that was left in the ground. We reject that argument. As we explained in our initial opinion, it is artificial to divide the interests in the coal lease in the way that Rith proposes and to disregard the coal that had already been mined under the permit when the Office of Surface Mining Regulation and Enforcement ("OSM") reversed itself and revoked the permit. Regulatory action that limits a coal lease owner to removing only 10 percent of the available coal at the outset cannot be meaningfully distinguished from a course of regulatory action that initially permits unrestricted mining but then, after 10 percent of the coal has been removed, prohibits the owner from taking the remaining 90 percent. The effect of the regulatory action in this case was to permit Rith to take some coal from the property that was the subject of its leases and then to prohibit it from taking any more. The course of regulatory action, viewed as a whole, did not

deprive Rith of all the economic value in its coal leases and thus did not constitute a categorical taking of Rith's property.

2

Rith's principal argument in its petition for rehearing is that after Palazzolo "the mere fact that an owner bought after a regulatory scheme was passed cannot defeat a partial takings claim." Citing *Nollan v. California Coastal Commission, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987),* Rith argues that it was "entitled to stand in the shoes of its predecessors who owned before SMCRA [the Surface Mining Control and Reclamation Act of 1977]." The implication of Rith's argument seems to be that in assessing Rith's investment-backed expectations, it was improper for this court to assign any weight to the regulatory regime established by SMCRA.

Neither Palazzolo nor Nollan holds that investment-backed expectations are irrelevant in analyzing a regulatory taking. The Palazzolo Court rejected the argument that when governmental action regulates the use of property, a person who purchases property after the date of the regulation may never challenge the regulation under the *Takings Clause. 121 S. Ct. at 2462.* As the Court explained, "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *121 S. Ct. at 2463.* In rejecting such a "blanket rule," however, the Court did not suggest that the reasonable expectations of persons in a highly regulated industry are not relevant to determining whether particular regulatory action constitutes a taking. Justice O'Connor, a member of the five-Justice majority in Palazzolo, made that point explicitly in her concurrence, where she wrote:

> "Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the Penn Central analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. . . . Interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations." *121 S. Ct. at 2465-66* (O'Connor, J., concurring).

As Justice O'Connor's opinion indicates, the role of investment-backed expectations in regulatory takings cases is well settled. Indeed, only three years ago in *Eastern Enterprises v. Apfel, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998),* the four-Justice plurality reaffirmed the role of investment-backed expectations in regulatory takings analysis. Justice O'Connor, writing for herself and three other Justices who were in the majority in Palazzolo, reiterated that among the factors that are entitled to "particular significance" in regulatory takings analysis is the regulation's "interference with reasonable investment backed expectations." *524 U.S. at 523;* see also *id. at 532; Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).* If the Court in Palazzolo had intended to discard this long-standing element of regulatory takings analysis it presumably would have been more explicit about doing so.

Nollan is no more helpful to Rith. The passage from Nollan on which Rith relies states:

> "Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *483 U.S. at 833-34 n.2.*

In that passage, the Nollan Court explained that the state was not entitled to an easement across the Nollans' property simply because the state had announced its policy requiring property owners to transfer such an easement prior to the time the Nollans purchased their land. That passage is couched in terms of a physical taking; the majority was simply stating that the timing of the state's announcement of its policy does not alter the fact that the fundamental nature of the action of obtaining an easement over land is a physical occupation, as opposed to a "mere restriction on its use," as suggested in a dissenting opinion. See *Nollan, 483 U.S. at 848-49 n.3* (Brennan, J., dissenting). We do not read the passage quoted by Rith to suggest that, in the context of a regulatory taking, the fact that a regulatory regime was in place before the owner purchased the property is irrelevant to the owner's investment-backed expectations.

In this case, which involves a business engaged in a highly regulated industry, the plaintiff's reasonable investment-backed expectations are an especially important consideration in the takings calculus. A party in Rith's position necessarily understands that it can expect the regulatory regime to impose some restraints on its right to mine coal under a coal lease. The leases themselves notified Rith of the uncertainty of obtaining permits to mine, and the low price that Rith paid for the leases may well reflect the widely understood risk that Rith would not be permitted to extract as much coal as it hoped from the leased properties.

The likelihood of regulatory restraint is especially high with regard to possible adverse environmental effects, such as potentially harmful runoff from the mining operations, which have long been regarded as proper subjects for the exercise of the state's police power.

In sum, our conclusion that reasonable investment-backed expectations play an important role in regulatory takings cases is not inconsistent with anything in the Supreme Court's decisions in Nollan and Palazzolo. In its starkest form, the argument that the Supreme Court rejected in Nollan and Palazzolo suggests that the government may take any private property without compensation as long as it announces far enough in advance its intention to do so. To reject such a "blanket rule," as the Palazzolo Court termed it, falls far short of suggesting that reasonable investment-backed expectations no longer have a role to play in regulatory takings analysis.

3

Two other factors that the Supreme Court has emphasized as especially important in the analysis of regulatory takings are the nature of the governmental action and the diminution in value caused by that action. See *Penn Central, 438 U.S. at 124.* Rith argues that even if the regulatory action in this case does not constitute a categorical taking, and the Penn Central analysis applies, it should prevail. We disagree.

Although the regulatory action in this case caused a substantial diminution in the value of Rith's coal leases, it did not deprive Rith of its opportunity to make a profit on the leases; it simply reduced the margin of profit that Rith had hoped to achieve. The record reflects that the coal that Rith was able to mine resulted in a substantial profit for its investors in light of the price paid for the coal lease. Thus, the permit revocation in this case, like the regulation at issue in *Keystone Bituminous Coal Ass'n v. DeBenedictis,*

480 U.S. 470, 485, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987), did not "make[ ]it impossible for [Rith] to profitably engage in [its] business."

With respect to the nature of the governmental action, the revocation of the permit, as we suggested earlier, was an exercise of the police power directed at protecting the safety, health, and welfare of the communities surrounding the Rith mine site by preventing harmful runoff. The exercise of the police power to address that kind of general public welfare concern is the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations. See *Keystone, 480 U.S. at 488-92; Agins v. Tiburon, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980)* (land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests"); *Penn Central, 438 U.S. at 127* (use restriction on property is not a taking if it is "reasonably necessary to the effectuation of a substantial government purpose").

4

Finally, Rith continues to press its assertions that the government's decisions in this case were driven by political pressure, that Rith's mining activities did not present a significant risk of harmful acid mine drainage, and that Rith was unfairly singled out for disparate treatment. Those are claims that Rith either raised or could have raised in the administrative and judicial challenge to the denial of its permit. That challenge resulted in a ruling sustaining the permit denial on the merits, and findings by an administrative law judge that "the overburden [in Rith's mine] had a high propensity to produce acid mine drainage," and that Rith's abatement plan "would not accomplish the necessary reclamation of the site nor would it prevent damage to the hydrologic balance." In light of the

conclusion reached by both the administrative law judge and the Court of Federal Claims that Rith's mining proposal presented what the Court of Federal Claims judge called a "high probability of pollution of an aquifer," we have no basis from which to conclude that Rith was singled out for rejection because of political pressures brought to bear on OSM, and that but for those improper considerations, Rith's permit would not have been revoked.

In any event, in a takings case we assume that the underlying governmental action was lawful, and we decide only whether the governmental action in question constituted a taking for which compensation must be paid. Rith's complaints about the wrongfulness of the permit denial are therefore not properly presented in the context of its takings claim. The only question before us is whether Rith was entitled to be compensated for the effects of that action. Under the precedents discussed in our original opinion, which we do not believe have been undermined by the Supreme Court's decision in Palazzolo, we conclude that the revocation of Rith's mining permit did not constitute a taking for which Rith is entitled to compensation.

The petition for rehearing is denied.

Appendix B – – Notice of Entry of Judgment and Opinion of the United States Court of Appeals for the Federal Circuit Dated and Entered May 2, 2001

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 05/02/01

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course. [* * *]

JAN HORBALY
Clerk

cc: RAYMOND D. BATTOCCHI
KATHERINE BARTON [* * *]

RITH ENERGY INC. V. US, 99-5153, CFC-92-CV-480

* * * * *

Appendix B – – Opinion of the United States Court of Appeals for the Federal Circuit Dated and Entered May 2, 2001

RITH ENERGY, INC., Plaintiff-Appellant, v. UNITED STATES, Defendant-Appellee. 99-5153
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

247 F.3d 1355; 2001 U.S. App. LEXIS 7986; 52 ERC (BNA) 1400;31 ELR 20603
May 2, 2001, Decided
SUBSEQUENT HISTORY: Rehearing Denied November 5, 2001, Reported at: *2001 U.S. App. LEXIS 25140.*
PRIOR HISTORY: Appealed from: United States Court of Federal Claims. Judge John P. Wiese.
DISPOSITION: AFFIRMED.
COUNSEL: Raymond D. Battocchi, Gabeler, Battocchi & Griggs LLC, of McLean, Virginia, argued for plaintiff-appellant. With him on the brief were John R. Powell and Vicki A. Paisley. Of counsel on the brief was Walter H. Fleischer, of Washington, DC.
Katherine J. Barton, Attorney, Environmental and Natural Resources Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Lois J. Schiffer, Assistant Attorney General; John A. Bryson, Attorney; and Susan V. Cook, Attorney. Of counsel on the brief was Thomas A. Bovard, Attorney, Office of the Solicitor, Department of the Interior, of Washington, DC.
Glenn Sugameli, Senior Counsel, National Wildlife Federation, of Washington, DC, for amicus curiae National Wildlife Federation.
Nancie G. Marzulla, Defenders of Property Rights, of Washington, DC, for amicus curiae National Mining Association.

JUDGES: Before MAYER, Chief Judge, LOURIE, and BRYSON, Circuit Judges.

OPINION: BRYSON, Circuit Judge.

In 1985, Rith Energy, Inc., purchased two coal mining leases in Tennessee. It subsequently applied for, and obtained, a federal permit to conduct mining operations on the leased property. After Rith had mined for a period of time, the Office of Surface Mining Reclamation and

Enforcement of the United States Department of the Interior (OSM) concluded that a portion of the property on which Rith was mining contained high levels of potentially toxic materials that could pollute the groundwater in the area through a process known as "acid mine drainage." OSM therefore suspended Rith's permit and prohibited it from mining most of the coal covered by the mining leases until Rith devised a plan to address the problem of acid mine drainage at its mining site. When Rith was unable to devise a plan that satisfied OSM, Rith's request to revise its mining permit was denied and Rith was unable to conduct any more mining at the site.

After several unsuccessful administrative and judicial challenges to OSM's actions, Rith sued the United States in the Court of Federal Claims, contending that its property had been taken without compensation, in violation of the Takings Clause of the Fifth Amendment. The Court of Federal Claims granted summary judgment for the government, and Rith appealed. Because the government's conduct at issue in this case did not result in a categorical taking of Rith's property, and because Rith did not have reasonable investment-backed expectations that it would be permitted to mine in a way that would create a high risk of acid mine drainage, we affirm.

I

The Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), *30 U.S.C. §§ 1201*-1328, established a "nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." *30 U.S.C. § 1202*(a). Pursuant to SMCRA, coal mine operators such as Rith must obtain a permit in order to conduct any mining operations. *30 U.S.C. § 1256.* Any permit issued under SMCRA must comply with certain environmental performance standards. *30 U.S.C. § 1265.* SMCRA also authorizes the Department of the Interior to prohibit mining operations that create an imminent danger to

the health and safety of the public or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. *30 U.S.C. § 1271.*

The environmental performance standards set forth in SMCRA require, among other things, that the mine operator

> "(10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by--
> (A) avoiding acid or other toxic mine drainage by such measures as, but not limited to--
> (i) preventing or removing water from contact with toxic producing deposits;
> (ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;
> (iii) casing, sealing, or otherwise managing boreholes, shafts, and wells and keeping acid or other toxic drainage from entering ground and surface waters[.]"

30 U.S.C. § 1265(b). Acid mine drainage is an environmental problem long associated with mining activity. It occurs when certain types of acidic soil are exposed to air and water. Once acid mine drainage begins, the chemical reaction that creates the toxic product becomes self-sustaining and can continue for years, long after all mining activity has ceased. See *Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 111 n.3 (1999);* see also *30 C.F.R. § 701.5* (defining acid mine drainage).

The coal leases at issue are located in the Cumberland Plateau region of Tennessee. Prior to April 1984, the State of Tennessee had administered SMCRA in that region. In the wake of failures by the State to implement, administer, maintain and enforce the state program adequately, OSM

took over the administration of SMCRA in Tennessee. OSM promulgated a federal program for Tennessee in October 1984. See *49 Fed. Reg. 15,496* (Apr. 18, 1984); *49 Fed. Reg. 38,874* (Oct. 1, 1984).

In June 1985, long after SMCRA was enacted and shortly after the federal takeover of SMCRA enforcement in Tennessee, Rith acquired the mineral leases at issue in this case. The two leases covered 250 acres in Bledsoe County, Tennessee, and cost Rith approximately $33,500. The leases included warnings regarding the uncertainties of obtaining mining permits and removing coal. After acquiring the leases, Rith applied to OSM for a permit to surface mine coal from two coal seams within the leased property, the Sewanee and Richland seams. At the time, there was extensive evidence that acid mine drainage was endemic to the Sewanee coal seam. That coal seam is situated above the Sewanee Conglomerate aquifer, a source of drinking water for area residents.

Rith planned to mine the leased property in three stages, with the first stage to cover the 89-acre area identified in the permit application. Rith estimated that a total of 385,000 tons of coal was located within the 250-acre leasehold; of that amount, Rith stated in its permit application that it anticipated obtaining 250,000 tons of coal from the 89-acre area covered by the permit.

As required by SMCRA, Rith submitted a determination of the probable hydrologic consequences of mining and reclamation operations in the subject area, supported by soil test results. The test results showed that the sampled materials were of low acidity and that the surrounding soils had buffering capabilities, thereby greatly reducing the risk of acid mine drainage. Based in part on those test results, OSM issued Rith a permit to mine in January 1986.

In response to several complaints, OSM visited Rith's mine site in March 1986 and obtained additional soil samples. Those samples showed the presence of a thick zone of acidic

material in the shale overburden of the Sewanee coal seam. The OSM samples indicated that the potential acidity of the overburden at Rith's site was some 250 percent greater than had been represented by Rith, and that the neutralization capacity of the soil was near zero. OSM directed Rith to provide further soil samples. Based on those samples, OSM concluded that the overburden posed a threat to the hydrological balance outside the permit area. In light of the "diametrically opposite" test results and what it characterized as a greatly heightened risk of acid mine drainage, OSM suspended Rith's permit in June 1986. Rith did not appeal OSM's decision to suspend its permit.

OSM invited Rith to submit a toxic materials handling plan that would take into account the heightened risk of acid mine drainage at the Sewanee coal seam. Rith submitted a number of plans in an effort to have the suspension lifted, but none satisfied OSM that Rith had adequately addressed the concerns OSM had raised. From shortly after the issuance of the suspension order until May 1987, however, Rith was permitted to continue mining portions of the Richland coal seam where the risk of acid mine drainage was not as great. Rith ultimately extracted approximately 35,700 tons of coal from the Sewanee and Richland coal seams, which resulted in a profit of approximately $14 per ton.

In September 1988, OSM rejected Rith's final proposed toxic materials handling plan and denied a permit to resume mining in the disputed area. Rith then filed an administrative appeal pursuant to *30 U.S.C. § 1264.* In the administrative appeal, Rith challenged OSM's actions on a number of grounds, including its contention that acid mine drainage was unlikely to occur at the mine site and that its toxic materials handling plan was sufficient to prevent hydrologic damage outside the permit area if acid mine drainage did occur.

After a hearing, an administrative law judge from the Interior Department's Office of Hearings and Appeals

sustained OSM's rejection of Rith's plan. The administrative law judge concluded that "the overburden on the north side of [Rith's] permit was undeniably of a highly acidic nature" and that it "had a high propensity to produce acid mine drainage." Absent an adequate toxic materials handling plan, the administrative law judge found, there was "a high probability that there would be acid mine drainage into the Sewanee Conglomerate aquifer." Finally, the administrative law judge concluded that Rith's toxic materials handling plan "would not accomplish the necessary reclamation of the site, nor would it prevent damage to the hydrologic balance." Rith appealed the decision of the administrative law judge to the Interior Board of Land Appeals (IBLA), which upheld the administrative law judge's findings and affirmed his ruling.

Both before and after the conclusion of the administrative proceedings, Rith instituted several actions in the United States District Court for the Eastern District of Tennessee challenging OSM's conduct with respect to Rith's mining permit, including an action seeking review of the IBLA ruling. In August 1990, Rith moved to dismiss the action in which it sought review of the IBLA decision. The district court granted that motion and dismissed the appeal with prejudice. After most of the claims in the other proceedings were dismissed on jurisdictional grounds, the only remaining claim from the various district court actions was Rith's claim for damages of $5 million against the United States. The district court transferred that claim to the United States Court of Federal Claims in May 1992.

In the Court of Federal Claims, Rith filed an amended complaint that included a takings claim. On cross-motions for summary judgment, the court ruled that no taking had occurred and accordingly entered judgment for the United States. The court found that "OSM's denial of a mining permit to plaintiff, because of the high probability of acid mine draining into the Sewanee Conglomerate aquifer,

represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject under Tennessee nuisance law." *Rith Energy , 44 Fed. Cl. at 115.* The fact that Rith was granted a surface water discharge permit by the state regulatory body was not persuasive evidence that Rith's mining activities were consistent with state law, the court explained, because

> "the information plaintiff submitted to the state officials no more informed them of the high probability of harm to the Sewanee aquifer than did that same data when presented to the federal officials. We can justifiably assume, however, that even as the federal officials were persuaded to reexamine the validity of the permit they initially had issued, so too would the state officials. A high probability of pollution of an aquifer is not within the tolerances of either regulatory scheme--the Tennessee Water Quality Control Act or SMCRA."

Id.

In an order denying a motion for reconsideration, the trial court added that the property use that was denied in this case--"the conduct of a surface mining operation that held out a 'high probability' of introducing acid mine drainage into the Sewanee Conglomerate aquifer"--is not a property use that Rith "could legitimately claim it had a right to pursue in consonance with relevant state property and nuisance principles." *Rith Energy, Inc. v. United States, 44 Fed. Cl. 366, 367 (1999).*

II

Rith asserts that by preventing it from mining on the property covered by its coal leases, the government took its property without compensation, in violation of the Fifth Amendment. The Court of Federal Claims rejected Rith's takings claim on the ground that under Tennessee nuisance law, Rith had no right to mine in a way that was likely to

produce acid mine drainage, and that its property right in the coal leases therefore did not include the right to mine the Sewanee seam in the way that it wanted to. The court's analysis was based on the so-called "nuisance defense" to takings claims described by the Supreme Court in *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992),* where the Court held that to avoid constituting a taking, a regulatory restraint that prohibits all economically beneficial use of land "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id. at 1029.* The Court in Lucas explained that when a regulation "that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Id. at 1030.*

Rith argues that its activities would not have been contrary to Tennessee nuisance law and that OSM's restraint on Rith's mining activities, which deprived Rith of all economic value in the coal leases, therefore constituted a compensable taking of its property interest in those leases. We need not reach the question whether Rith's mining activities would have been prohibited by Tennessee nuisance law, however, because we conclude that when Rith purchased its coal leases it did not have any reason to expect that it would be permitted to mine in a way that was likely to produce acid mine drainage.

A

Under the current state of takings law, it is often important to determine at the outset whether a particular claimed taking was "categorical" or not. A categorical taking has been defined as one in which "all economically viable use, i.e., all economic value, has been taken by the regulatory imposition." *Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1357* (Fed. Cir.), modifying *208 F.3d 1374 (Fed. Cir. 2000).* A categorical taking is distinct from a taking "that is the consequence of a regulatory imposition that

prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use." Id. In Palm Beach Isles, this court held that one significant difference between a categorical taking and a non-categorical taking is that in the former case, analyzing whether compensation is due does not require an inquiry into whether the plaintiff had reasonable investment-backed expectations that were defeated by the regulatory measure that gave rise to the takings claim.

We agree with the government that the regulatory restraint at issue in this case did not result in a categorical taking. During the period that Rith was permitted to mine coal under the permit that OSM issued in January 1986, it extracted approximately 15,900 tons of coal from the leased property. Even after OSM suspended Rith's permit in June 1986, OSM permitted Rith to continue mining coal from one of the two coal seams on the property, and Rith extracted an additional 19,800 tons of coal from that seam. Although Rith stated in its permit application that it expected to extract a total of approximately 250,000 tons of coal from the property covered by the permit (and later stated that it expected to extract approximately 385,000 tons of coal from the entire 250-acre area), Rith acknowledges that the 35,700 tons of coal that it extracted before it terminated its mining activities produced a profit of approximately $14 per ton, or a total profit of approximately $500,000, for Rith's investors. Because Rith purchased the coal leases for a total of $33,500, it was able to recover its investment and considerably more in spite of the permitting restrictions imposed by OSM.

Rith argues that in determining whether the government action in this case constituted a categorical taking, the loss to Rith must be measured as of September 1988, when OSM refused to accept Rith's last version of its toxic materials handling plan. After that date, Rith was unable to mine any

more coal from the leased property, and Rith contends that as of that time it was deprived of all remaining economic value in the coal leases.

In measuring the regulatory burden on Rith's mining activities, it is appropriate to look at the extent to which Rith was able to exploit its leases throughout the permitting period. By focusing on its inability to mine any coal under its permit after September 1988, Rith ignores the fact that it was allowed to extract a substantial amount of coal under its mining permit prior to that date. If the permit had provided at the outset that Rith could mine 35,700 tons of coal on the 89 acres that were covered by its permit, it would not be accurate to characterize the regulatory restraint as categorical. The analysis is not different simply because OSM imposed a condition on the permit during the course of Rith's mining activities that had the effect of preventing Rith from extracting any more than the 35,700 tons it had already mined. If, for example, OSM's restraints had been made effective after Rith had removed half the coal from the leased property, it could hardly be said that the restraint gave rise to a categorical taking because OSM's prohibition on further mining took the entire remaining value of the leases as of that time. See *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 643-44, 124 L. Ed. 2d 539, 113 S. Ct. 2264 (1993)* ("a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable"); *Keystone Bituminous Coal Co. v. DeBenedictis, 480 U.S. 470, 498-99, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987).*

Because Rith applied for a permit to mine all of the coal within the 89-acre area identified in the application, the impact of OSM's action must be measured, at minimum, by the entire coal reserve covered by the permit, not the portion that remained at the time Rith was forced to stop mining. The regulatory program began with the issuance of the

permit in January 1986, extended through the period in which the permit was suspended, starting in June 1986, and ended when Rith abandoned further efforts to devise a satisfactory toxic materials handling plan in September 1988. During the first six months of that period, Rith was able to mine under the authority of the permit, and even during the period following the permit suspension, Rith was allowed to continue mining coal from one of the two seams on the leased property. Viewing the impact of the regulatory program as a whole, OSM's restraints significantly limited Rith's rights to mine, but even within those limits Rith was able to mine a significant amount of coal that earned Rith a substantial profit on its investment in the leases.

In determining whether a taking is categorical, "the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986);* see *Forest Props., Inc. v. United States, 177 F.3d 1360, 1367 (Fed. Cir. 1999)* (the fact that, despite the challenged regulatory restraint, the value of the subject property increased more than three-fold in 11 years "itself undermines Forest's contention that its property was taken"). While the $500,000 in profit that Rith earned on the extracted coal was far less than it hoped to earn from the coal leases, the sum was considerably more than the $33,500 that Rith invested in the leases. Thus, the 35,700 tons, although only about 14 percent of the amount Rith hoped to extract under its permit, cannot be regarded as merely a "nominal" recovery, see *Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994),* reflecting the "total wipe-out" that accompanies a categorical taking, see *Palm Beach Isles, 208 F.3d at 1380.* For that reason, it is not appropriate to characterize OSM's restraints as "a prohibition of all economically viable use" of the property in question, see *Florida Rock, 18 F.3d at 1564-65.* The restraint in this case therefore did not result in one of "the relatively rare

situations where the government has deprived a landowner of all economically beneficial uses." *Lucas, 505 U.S. at 1018.*

B

Under this court's decision in Palm Beach Isles, the consequence of concluding that there was no categorical taking in this case is that in order to establish that OSM's regulatory restraints constituted a compensable taking, Rith must show that it had a reasonable investment-backed expectation that it would not be subject to such restraints when it acquired the coal leases. Our precedents make clear that Rith could not have had such expectations. SMCRA was enacted eight years before Rith purchased the coal leases. Its provisions include environmental performance standards that directly address acid mine drainage and make clear that surface mining will not be permitted unless the permittee minimizes the "disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems . . . by avoiding acid or other toxic mine drainage . . . ." *30 U.S.C. § 1265* (b)(10). In light of that statutory provision, Rith could not reasonably have expected that it would be free from regulatory oversight with regard to the potential for acid mine drainage, and it could not reasonably have expected that it would not be required to adopt potentially expensive measures to avoid acid mine drainage if OSM determined that its mining activities could result in the release of those or other toxins. As this court explained in *M & J Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir. 1995),* at the time Rith acquired its mining rights, "it knew or should have known that it could not mine in such a way as to endanger public health or safety and that any state authorization it may have received was subordinate to the national standards that were established by SMCRA and enforced by OSM." See generally *Good v. United States, 189 F.3d 1355, 1362 (Fed. Cir. 1999)* (holding that the

property owner had no reasonable investment-backed expectations because he "had both constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property"); *Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994)* (stating that one who buys with knowledge of regulatory restrictions on the use of property "assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall.").

Section 521(a)(2) of SMCRA, *30 U.S.C. § 1271*(a)(2), provides that when the Secretary determines that any condition exists that creates "an imminent danger to the health or safety of the public or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources," the Secretary may order the immediate cessation of surface coal mining operations relating to that condition. Although OSM did not explicitly invoke section 521(a)(2) when it suspended Rith's permit in June 1986, that was the apparent source of its authority to issue the suspension order. Because Rith did not appeal the suspension of its permit, it was not necessary for the administrative law judge to address directly whether the standard of section 521(a)(2) was satisfied, but the administrative law judge's findings in the appeal from the denial of the revision to Rith's permit support the suspension--particularly his findings that absent an effective toxic materials handling plan, there was "a high probability that there would be acid mine drainage into the Sewanee Conglomerate aquifer" resulting in damage to the hydrologic balance. In support of his findings, the administrative law judge cited testimony from an OSM employee that Rith's mine site "contained one of the highest levels of acid material that he had ever seen, nationwide, in nine years of looking at hundreds of permits." The Court of Federal Claims, moreover, noted that it is well known that acid mine

drainage can destroy aquatic life and create serious problems for domestic and public water supplies, and that acid mine drainage can continue for years, even after mining operations have been halted. *Rith Energy , 44 Fed. Cl. at 111 n.3.* For those reasons, the court agreed with the administrative law judge that if OSM had failed to act, there was a high probability that acid mine drainage would have occurred, severely polluting the Sewanee Conglomerate and endangering domestic and public water supplies.

Although Rith attacks the lawfulness of OSM's rejection of its toxic materials handling plan, that challenge is not properly before us. Like the coal mine operator in M & J Coal, Rith had the opportunity to challenge the lawfulness of OSM's actions, including the suspension of its permit, the rejection of its toxic materials handling plan, and the ultimate denial of its permit in administrative proceedings and through judicial review in a United States district court. In fact, Rith challenged the rejection of its toxic materials handling plan administratively, and lost. Like the coal mine operator in M & J Coal, Rith appealed that decision to the IBLA. After losing before the IBLA, Rith sought judicial review in federal district court, but dismissed that action. In a similar setting, we held in M & J Coal that "neither the Court of Federal Claims nor this court may entertain a collateral challenge to the validity of OSM's actions," id. at 1154, and we see no reason to depart from that holding here.

C

Citing *Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998),* Rith argues that it should be given an opportunity to challenge the lawfulness of OSM's suspension and permit denial in this action. Del-Rio, however, does not authorize such a challenge. In Del-Rio, we held that the plaintiff could bring a takings claim without first challenging the lawfulness of the government's action, or establishing the scope of its property interest, in an administrative proceeding. That is so because a takings

claim lies, as long as the government's action was authorized, even if the government's action was subject to legal challenge on some other ground. We explained that an uncompensated taking and an unlawful government action constitute "two separate wrongs [that] give rise to two separate causes of action," and that a property owner is free either to sue in district court for asserted improprieties committed in the course of the challenged action or to sue for an uncompensated taking in the Court of Federal Claims. *Id. at 1364.* To proceed on the second cause of action does not require that the plaintiff first litigate, and lose, on the first. Nor is the plaintiff required to use the administrative review proceeding to establish the scope of the property right that it contends was taken. See id.

To the extent that Rith suggests that Del-Rio entitles it to argue in the Court of Federal Claims that OSM's permit denial was unlawful under SMCRA, or to relitigate in the takings action its unsuccessful statutory challenge to the permit denial, it reads too much into Del-Rio. The question whether OSM violated SMCRA by its ruling on a permit application in a particular case was assigned by Congress to the administrative process within the Department of the Interior, subject to judicial review in a district court. Del-Rio does not give the Court of Federal Claims authority to adjudicate that issue de novo. Thus, if the plaintiff claims that its property was taken regardless of whether the agency acted consistently with its statutory and regulatory mandate, Del-Rio stands for the proposition that the takings claim can be litigated in the Court of Federal Claims without the need first to litigate the issue of lawfulness in administrative proceedings before the agency. On the other hand, to the extent that the plaintiff claims it is entitled to prevail because the agency acted in violation of statute or regulation, Del-Rio does not give the plaintiff a right to litigate that issue in a takings action rather than in the congressionally mandated administrative review proceeding.

In this case, having forgone its challenge to OSM's administrative actions, Rith is not free to renew its challenge to those actions under the cover of a takings claim in the Court of Federal Claims. Rith is thus required to litigate its takings claim on the assumption that the administrative action was both authorized and lawful. On the facts of this case, the consequence of assuming the lawfulness of OSM's actions, i.e., that OSM was correct in concluding that Rith's mining activities constituted an unacceptable threat of acid mine drainage and the consequent pollution of groundwater in the area surrounding the mine operations, is to limit the issue before us to whether prohibiting Rith from mining under those circumstances constitutes a taking. And on that issue, as we have explained, the absence of a reasonable investment-backed expectation on Rith's part that it would be permitted to mine while producing acid mine discharge in violation of SMCRA defeats its takings claim. We therefore uphold the judgment of the Court of Federal Claims.

AFFIRMED.

Appendix C -- Opinion and Order of the United States Court of Federal Claims Dated and Filed July14, 1999

RITH ENERGY, INC., Plaintiff, v. THE UNITED STATES, Defendant, No. 92-480 L

UNITED STATES COURT OF FEDERAL CLAIMS

44 Fed. Cl. 370; 1999 U.S. Claims LEXIS 192

July 14, 1999, Filed

OPINIONBY: John P. Wiese

OPINION: ORDER DENYING MOTION FOR RECONSIDERATION

The restrictions imposed by Tennessee's Water Quality Control Act with regard to use of the State's water resources do not represent a set of newly- proclaimed tenets of public nuisance law. To the contrary, activities that cause the pollution of domestic waters have long been recognized by the courts of Tennessee to be contrary to the public's health and safety and therefore enjoinable as a nuisance. *Nunnelly v. Southern Iron Co., 94 Tenn. 397, 29 S.W. 361 (Tenn. 1895); H.B. Bowling Coal Co. v. Ruffner, 117 Tenn. 180, 100 S.W. 116 (Tenn. 1907); Love v. Nashville Agricultural and Normal Institute, 146 Tenn. 550, 243 S.W. 304 (Tenn. 1922).*

And whether the enforcement of these restrictions is accomplished by the state regulatory body or by federal officials acting under the authority of SMCRA is not an issue relevant to the takings analysis. Under the holding of *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992),* the test is whether the property use that is proscribed is based on "restrictions that background principles of the State's law of

property and nuisance already place upon land ownership." Where that condition is met, no compensation is owed.

The property use that was denied here, the conduct of a surface mining operation that held out a "high probability" of introducing acid mine drainage into the Sewanee Conglomerate aquifer, is not a property use plaintiff could legitimately claim it had a right to pursue in consonance with relevant state property and nuisance principles.

The motion for reconsideration is denied.

John P. Wiese, Judge

Appendix D – – Opinion of the United States Court of Federal Claims Dated and Filed June 25, 1999

RITH ENERGY, INC., Plaintiff, v. THE UNITED STATES,Defendant.

No. 92-480 L

UNITED STATES COURT OF FEDERAL CLAIMS

44 Fed. Cl. 108; 1999 U.S. Claims LEXIS 146; 48 ERC (BNA)1951; 146 Oil & Gas Rep. 193; 29 ELR 21389

June 25, 1999, Filed

COUNSEL: Raymond D. Battocchi, McLean, Virginia, for plaintiff. John R. Powell and Vicki Ann Paisley, of counsel.

Susan V. Cook, with whom were Assistant Attorney General Lois J. Schiffer, Deputy Chief James E. Brookshire, Environment & Natural Resources Division, Department of Justice, Washington, D.C., for defendant. Tom Bovard, Department of Interior, of counsel.

OPINION:

WIESE, Judge.

The question presented in this case is whether the Government's rejection of plaintiff's proposed mining plan, combined with the prohibition on all mining operations that that rejection occasioned, effected a taking of plaintiff's property for which just compensation is now owing under the Fifth Amendment of the United States Constitution. The issue is before us on cross-motions for summary judgment. Based on the parties' written and oral presentations, we conclude that no compensable taking has occurred and accordingly direct the entry of judgment in the Government's favor.

BACKGROUND

The Surface Mining Control and Reclamation Act of 1977, Title 30 of the United States Code, section 1201(c)(1994), sets forth Congress' finding that:

> "(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources . . . ."

In recognition of these many concerns, Congress enacted the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") with the express objective, among others, of establishing "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." *30 U.S.C. § 1202*(a). Towards this end, SMCRA charges the Office of Surface Mining Reclamation and Enforcement ("OSM") with the task of regulating the surface coal mining industry by prohibiting mining operations that endanger public health and safety or harm the environment.

SMCRA provides in relevant part as follows:

> "When, on the basis of any Federal inspection, the Secretary [of Interior] or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this [Act] or any permit condition required by this [Act], which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. . . . Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm."

30 U.S.C. § 1271(2) (1994).

The Regulatory Process

On June 29, 1985, almost eight years after the passage of SMCRA, plaintiff, Rith Energy, purchased two leases to surface-mine coal on about 250 acres of land situated along the Sewanee and Richland coal seams in Tennessee. At the time it acquired these leases, plaintiff was aware that its

mining operations would invade the rock strata overlying the aquifer that supplies the local community with its drinking water - those geologic formations known as the Sewanee Conglomerate, the Newton Sandstone, and the Whitewell Shale.

In August 1985, plaintiff, pursuant to SMCRA, applied for a surface-mining permit.[1] SMCRA required plaintiff to obtain soil samples to determine the level of toxicity in the soil to be mined, and to prepare a Toxic Materials Handling Plan ("handling plan") explaining how it would treat any overburden[2] that exhibited a potential to cause acid mine drainage ("AMD").[3] With the assistance of a mining

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[1] In addition to its mining permit, plaintiff was also required to apply for, and obtain, a permit under the Federal Water Pollution Control Act, *33 U.S.C. §§ 1311*-1387 (1994 & Supp. III 1997). That act requires the issuance of a National Pollutant Discharge Elimination System ("NPDES") permit by the cognizant state regulatory body -- in this case the Tennessee Division of Water Quality Control -- prior to the discharge of any effluent into a state's waters. NPDES permits require compliance with all applicable federal and state water quality standards. An NPDES permit was issued to plaintiff on January 17, 1986.

[2] Overburden refers to the soils lying above the coal deposits.

[3] AMD is defined by federal regulations as "water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity, discharged from an active, inactive or abandoned surface coal mine and reclamation operation or from an area affected by surface coal mining and reclamation operations." *30 C.F.R. § 701.5* (1998). AMD occurs when certain types of acidic soil are exposed to air and water. Once AMD begins, the chemical reaction that creates the toxic product becomes self-sustaining and can continue for years, even after all mining activity has ceased.

consultancy firm, plaintiff obtained and submitted three soil samples, two showing a pH level of approximately 5.2 and one showing a pH level of 3.4, thus indicating a relatively low potential for AMD. Along with these samples, plaintiff also submitted a handling plan which explained that any overburden exhibiting the potential to produce AMD would be mixed and regraded with a much larger volume of non-toxic material in order effectively to buffer the potential for AMD. The plan further indicated that all surface drainage from the disturbed areas of the mine-site would be passed through a sediment pond for treatment before discharge from the property.

AMD can adversely affect the quality of surface water by, inter alia, lowering its pH level, reducing its natural alkalinity, increasing its total hardness, and adding undesirable amounts of iron, manganese, aluminum, sulfates, and other elements and suspended materials. AMD also adversely affects groundwater by introducing contaminants and by changing pH levels, thereby threatening local residential drinking-water supplies.

The lower pH levels associated with AMD also have been demonstrated to have a lethal and pathological effect on fish and aquatic life. As AMD lowers the water's pH level, the water becomes more toxic, thereby interfering with the metabolic processes by which bacteria, aquatic insects, and fish utilize oxygen for respiration. The neutralization of the acidity via dilution can cause manganese sludge to precipitate out, which then physically degrades benthic habitat, smothers fish eggs, and physically damages gill tissue. These processes affect both the organisms themselves and other aquatic life, such as fish, which rely on these organisms as a source of food.

Aquatic life is also destroyed by the toxicity of the chemicals in AMD, and by the iron precipitates and other suspended materials which cloud the water and coat the sides and the bottoms of water bodies, thereby destroying a stream's aesthetic qualities and preventing the growth of aquatic life.

Based on these several representations, on January 3, 1986, OSM issued a "Finding of No Significant Impact," meaning that plaintiff's mining operations were expected to "produce little or no adverse change in the prevailing hydrologic balance . . . ." OSM then issued plaintiff a five-year permit to mine the Sewanee and Richland coal seams, with plaintiff's mining operations beginning immediately thereafter.

On March 25, 1986, OSM, acting in response to complaints both from local area residents and a regional environmental protection group, decided to re-sample the overburden in plaintiff's permit area. The test results obtained from these new soil samples revealed an overburden that was approximately 250% more acidic than indicated by the pH levels recorded in the test data that had accompanied plaintiff's permit application. Further, the potential neutralization factor of the soil, i.e., the soil's capacity to offset the acidic overburden, was found to be nearly zero, thus indicating a roughly 500% variance from the earlier-reported data. On the basis of these changed findings, OSM concluded that the potential for AMD posed a significantly greater danger to the environment and to the public health and safety than first thought. Accordingly, on June 27, 1986, OSM suspended plaintiff's permit to mine the Sewanee seam pending submission of a new handling plan -- a plan sufficient to address the increased AMD hazards evident in the soil chemistry as well as satisfy the requirements for an acceptable reclamation of the mine-site.

In July 1986, while the re-permitting process was underway, plaintiff received approval to mine a portion of the Richland seam -- an area where mining could occur without disturbing the overburden above the Sewanee seam. Rith continued to mine this section of its property until May

1987, when OSM finally ordered plaintiff to cease all mining operations.[4]

Between June 1986 and September 1988, plaintiff submitted a series of handling plans to OSM. Each resulted in the issuance of a Technical Deficiency Letter indicating OSM's rejection of the plan for lack of technical adequacy. Eventually, plaintiff was advised by OSM that, due to the high acidity of the Sewanee overburden, an acceptable handling plan would have to incorporate the use of impermeable pods.[5] On September 6, 1988, OSM denied plaintiff's Significant Revision No. 10 -- plaintiff's final attempt to obtain a permit revision. This final rejection was based on the fact that, in reviewing plaintiffs submission, OSM was unable to make a finding that the application was complete and accurate, or that reclamation could be accomplished as required by SMCR

The Administrative Appeals

Upon receiving notice of the rejection of its final revision, plaintiff filed an appeal with the Department of Interior's Office of Hearing and Appeals. A six-day hearing on the denial of Significant Revision No. 10 was conducted in January 1989. On March 28, 1989, the Office of Hearings and Appeals issued a decision sustaining OSM's denial of

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[4] From January 1986 to the end of plaintiff's mining operation, plaintiff extracted a total of 35,665.11 tons of coal or, roughly, 9.3% of the approximately 385,000 tons of minable coal existing within the boundaries of the two leases.

[5] Impermeable pods completely isolate toxic and acid-producing materials, thereby preventing contact with water and air, and thus insuring that AMD in fact is never produced.

Revision No. 10. In his opinion, Administrative Judge Torbett noted the following:

> "The undersigned finds that the overburden on the north side of Applicant's permit was undeniably of a highly acidic nature. Unless Applicant could demonstrate that the pod concept would work, there would have been a high probability that there would be acid mine drainage into the Sewanee Conglomerate aquifer. Given the importance of particle size to the issue of permeability of the pods, the undersigned finds that Respondent's concerns for damage to the hydrology from Applicant's proposed toxic material handling plan were legitimate.

Rith Energy, Inc., No. NX 89-1-PR at 26 (March 1989).

The opinion concluded by saying:

> "The evidence proves that that overburden had a high propensity to produce acid mine drainage. The clear weight of the evidence also shows that Applicant's plan would not accomplish the necessary reclamation of the site, nor would it prevent damage to the hydrologic balance. The undersigned therefore holds that the Respondent properly denied Significant Revision No. 10 and its subsequent revisions.

Id. at 27.

On October 24, 1989, the Interior Board of Land appeals affirmed Judge Torbett's decision stating in part: "Based on our review of the record we find that the evidence supports Judge Torbett's decision that OSMRE properly denied Rith's application for permit revision." *Rith Energy, Inc., 111 IBLA 239, 244 (1989).*

Judicial Proceedings

Plaintiff's dissatisfaction with the administrative process led to its filing of three suits against the United States in the United States District Court for the Eastern District of Tennessee. The first, filed August 31, 1988, alleged that the June 27, 1986 permit suspension was an arbitrary and capricious action that violated Rith's rights to procedural and substantive due process and to equal protection of the law. Additionally, it was claimed that the action constituted a taking of Rith's property. The second action, filed January 25, 1989, sought judicial review of OSM's September 6, 1988 decision (the decision rejecting Significant Revision No. 10), as well as damages of $5 million. The third action, filed November 22, 1989, sought judicial review of the two administrative decisions -- the March 28, 1989 decision of the Office of Hearing and Appeals and the October 24, 1989 decision of the Interior Board of Land Appeals. The three suits were subsequently consolidated by the district court.

On August 6, 1990, Rith moved for and obtained the dismissal of its last-filed action. As to the remaining actions, these the district court dismissed on the ground that Rith had not exhausted its administrative remedies.

On appeal, the United States Court of Appeals for the Sixth Circuit vacated the dismissal and remanded to the district court with instructions to determine whether it would be in the interests of justice to transfer the case to the Claims Court (now the Court of Federal Claims) pursuant to *28 U.S.C. § 1631* (1994). On May 12, 1992, the case was transferred to this court.

Following the transfer, on August 17, 1992, plaintiff filed an amended complaint alleging a taking of its property as well as various other claims for relief that essentially

repeated what had been alleged in the suits before the district court. Without objection from plaintiff, all claims except the taking claim have been dismissed.

DISCUSSION

The Fifth Amendment to the United States Constitution concludes with the clause: "nor shall private property be taken for public use, without just compensation." The purpose of the clause -- as the much-quoted language from *Armstrong v. United States, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960)* explains -- is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Thus, in every case alleging a taking, the essential inquiry is whether the Government has caused a loss of private property for which considerations of fairness dictate the payment of appropriate compensation.

Traditionally, this fairness inquiry has been conducted through a three-factor analysis. Courts have examined the character of the governmental action that gave rise to the claimed loss, the extent to which that action interfered with an owner's reasonable investment-backed expectations, and the extent of the economic harm occasioned by the Government's action. *Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).* When "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922).*

Not every taking case, however, requires application of this three-factor analysis in order to determine whether the alleged property loss at issue demands the payment of just compensation. Some cases are governed by an absolute rule. Thus, for example, where the Government has

physically invaded an owner's property, a taking will be recognized no matter how minimal the intrusion nor how weighty the public interests asserted in its support. *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982).* The recognition of a per se taking in this circumstance is grounded in the fact that the physical dispossession of a property owner necessarily deprives that owner of all incidents of ownership in the property so affected.

Conversely, regulatory action that restrains an owner from the beneficial use of his property -- even a restraint barring all such use -- cannot become the basis of a compensable taking where the restraint that is imposed is grounded "in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992).* Such restrictions are seen as inhering in the title itself. As explained in *Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994),* "property rights as a matter of law since Blackstone's day have been understood to be subject to the power of the state to abate nuisances. If the imposed restraint would have been justified under the state's traditional nuisance law, then the property owner's bundle of rights did not include the right claimed, and no taking could occur."

Restrictions on the use of property that have their source in federal law also come within this rule to the extent such restrictions do no more man mirror the results that could be reached under the state's nuisance law. *Loveladies Harbor, 28 F.3d at 1182:* "Since the federal power to regulate without risk of a taking is based on the state's nuisance law . . . the federal authority, if exercised, is exercised at the risk of an absence of state authority."

Based on the foregoing, the question we start with is whether the denial of a mining permit by federal officials, acting under the authority of SMCRA, parallels a result that could have been achieved under the state's nuisance law. To put it most simply, would Tennessee nuisance law sanction the issuance of an injunction restraining Rith from proceeding with a surface mining operation given an adjudicated finding that, because of an inadequate handling plan, "there would [be] a high probability [of] acid mine drainage into the Sewanee Conglomerate aquifer"? *Rith Energy , No. NX 89-1 PR at 26.*

The answer is yes. Our conclusion is based on Tennessee's Water Quality Control Act of 1977 (the Act), Tenn. Code Ann. §§ 69-3-102 - 69-3-131 (1995 & Supp. 1998) -- an act that recognizes the waters of the state, including its groundwaters, as property of the state, held in public trust, and subject to a right of "the people of Tennessee, as beneficiaries of this trust . . . to unpolluted waters." Tenn. Code. Ann. § 69-3-102(a).

Consistent with the state's trust obligation to its citizens, the Act goes on to declare that its purpose is "to abate existing pollution of the waters of Tennessee, to reclaim polluted waters, to prevent the future pollution of the waters, and to plan for the future use of the waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters." Tenn. Code Ann. § 69-3-102(b).

To accomplish these purposes, the Act authorizes the promulgation of standards of quality for all waters of the state, Tenn. Code Ann. § 69-3-105, and the enforcement of these standards through a permit process that applies to a broad range of specified activities including:

> "The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized. . . ."

Tenn. Code Ann. § 69-3-108(b)(4).

Additionally, the Act directs that "under no circumstances shall the commissioner [of environment and conservation -- the state's permit-granting official] issue a permit for an activity which would cause a condition of pollution[6] either

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[6] "Pollution" is defined in the Act as "such alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of this state including, but not limited to, changes in temperature, taste, color, turbidity, or odor of the waters that will:

(A) Result or will likely result in harm, potential harm or detriment of the public health, safety, or welfare;

(B) Result or will likely result in harm, potential harm or detriment to the health of animals, birds, fish, or aquatic life;

(C) Render or will likely render the waters substantially less useful for domestic, municipal, industrial, agricultural, recreational, or other reasonable uses; or

(D) Leave or likely leave the waters in such condition as to violate any standards of water quality established by the board." Tenn. Code Ann. § 69-3-103(22).

by itself or in combination with others." Tenn. Code Ann. § 69-3-108(e).[7]

To reinforce the administrative controls exercised through the permitting process, the commissioner is authorized to "bring suit in the name of the department for any violation of the provisions of this part, seeking any remedy therein provided and any other statutory or common law remedy available for the control, prevention, and abatement of pollution." Tenn. Code Ann. § 69-3-107(3). That this authority includes the right to seek injunctive relief is specifically spelled out in Section 69-3-117: "The commissioner may initiate proceedings . . . against any person who is alleged to have violated or is about to violate this part [i.e., "Part 1 - Water Quality Control Act"], conditions of permits issued under this part, the rules and regulations of the board [i.e., the Water Quality Control board] or orders of the board or commissioner. In such action the commissioner may seek, and the court may grant, injunctive relief and any other relief available in law or equity."

To round out the commissioner's enforcement authority, the Act declares it to be "unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in

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[7] Although the Act prohibits the issuance of a permit for an activity that would cause or contribute to a condition of pollution, the commissioner may allow a water quality standard to be exceeded for a limited period of time provided "the waters to which the variance applies are not used as a current source of drinking water and such use is not reasonably anticipated for the term of the variance and a reasonable time thereafter." Tenn. Code Ann. § 69-3-108(k)(1).

combination with others, cause any of the damages as defined in Section 69-3-103(22) [i.e., pollution damages], unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance." Tenn. Code Ann. § 69-3-114(a).

Given the above-described elements of Tennessee's water quality control statute, we think it is virtually self-evident that OSM's denial of a mining permit to plaintiff, because of the high probability of acid mine drainage into the Sewanee Conglomerate aquifer, represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject under Tennessee nuisance law.

In an effort to overcome this conclusion, plaintiff points out that, in fact, it was granted a permit by the state regulatory body and therefore, it is argued, OSM's denial of a permit stands at odds rather than in harmony with the state's result. The contention is hardly persuasive. The information plaintiff submitted to the state officials no more informed them of the high probability of harm to the Sewanee aquifer than did that same data when presented to the federal officials. We can justifiably assume, however, that even as the federal Officials were persuaded to reexamine the validity of the permit they initially had issued, so too would the state officials. A high probability of pollution of an aquifer is not within the tolerances of either regulatory scheme -- the Tennessee Water Quality Control Act or SMCRA.[8]

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[8] Mining activity physically alters groundwater quality by accelerating the addition, through otherwise normal surface

(continued...)

CONCLUSION

Under Tennessee's Water Quality Control Act, a permit may not be issued for the conduct of a mining operation that would cause a condition of pollution affecting the state's waters. Plaintiff's surface mining operation has been determined to hold out a high probability of introducing acid drainage into the Sewanee Conglomerate aquifer. Accordingly, that operation would not qualify for the issuance of a permit; its conduct, therefore, would constitute an enjoinable nuisance under state law.

Pursuant to the authority of *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992),* and for the reasons set forth in this opinion, we conclude that no compensable taking has occurred. Defendant's motion for summary judgment is granted and plaintiff's cross-motion for partial summary judgment is denied. The Clerk is directed to dismiss the complaint.

(...continued)

drainage, of suspended solids such as silt and sediment which readily erode from the mineral particles that become exposed upon the break-up of the soil, rock strata and coal deposits. Appalachian Reg'l Comm'n, Acid Mine Drainage in Appalachia, H.R. Doc. No. 91-180, vol. 1 at 15 (1st Sess. 1969). Thus where mining activities result in the disruption of substrata containing high concentrations of acidity (i.e., iron sulfide minerals), the resulting alteration of the ground water satisfies the Act's definition of pollution: "such alteration of the physical . . . properties of the waters . . . that . . . will likely result in harm, potential harm, or detriment of the public health, safety, or welfare." Tenn. Code Ann. § 69-3-103(22)(A).

Appendix E – – Opinion of the Interior Board of Land Appeals, dated October 24, 1989

RITH ENERGY, INC. v. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-393

Interior Board of Land Appeals

111 IBLA 239; 1989 IBLA LEXIS 279

October 24, 1989, Decided

APPEARANCES:

Michael W. Boehm, Esq., Chattanooga, Tennessee, for petitioner;

Tom FitzGerald, Esq., Frankfort, Kentucky, for Save Our Cumberland Mountains, Inc., Intervenor; and Nicklas Holt, Esq., Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINIONBY: FRAZIER

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

By order of June 1, 1989, this Board granted a petition for discretionary review filed by Rith Energy, Inc. (Rith). Petitioner sought review of a decision by Administrative Law Judge David Torbett, dated March 28, 1989, sustaining a denial by the Knoxville Field Office (KFO), Office of Surface Mining Reclamation and Enforcement (OSMRE), of Rith's application for Significant Revision No. 10.

By its application, petitioner sought to revise permit 2583, which was issued to Rith on January 3, 1986, for an 89-acre surface coal mining operation in Bledsoe County, Tennessee. Shortly after issuance of the permit, OSMRE

suspended Rith's operations on a portion of this permit until Rith had submitted and OSMRE had approved an adequate toxic materials handling plan (TMHP). Rith submitted such a plan as Significant Revision No. 10 on January 15, 1988, and subsequently amended it following a series of technical reviews by OSMRE.

KFO denied Rith's application for Significant Revision No. 10 because it found that the application did not satisfy 30 CFR 942.774.13(c).[1] This regulation requires that an application for permit revision demonstrate, inter alia, that applicable requirements under 30 CFR 942.773.15(c) "which are pertinent to the revision" are met. Regulation 30 CFR 942.773.15(c) requires that an application affirmatively demonstrate, and the regulatory authority find, inter alia, that the application is complete and accurate and that reclamation, as required by the Act and the regulatory program, can be accomplished under the reclamation plan contained in the permit application.[2] In its decision, dated September 6, 1988, KFO expressly stated that it could make no such findings.

Immediately prior to issuing this decision of September 6, 1988, KFO had received from Tare, Inc., petitioner's consulting engineer, the last of three responses prepared by Tare, each addressing a deficiency letter issued by KFO. It was the consensus of the KFO technical review team that Rith remained unresponsive to the earlier deficiencies and

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[1] KFO's decision of Sept. 6, 1988, referred to regulations under the Tennessee Federal program. See 30 CFR Part 942.

[2] The Act referred to is the Surface Mining Control and Reclamation Act of 1977 (SMCRA), *30 U.S.C. § 1201* (1982). Requirements similar to 30 CFR 773.15(c) are set forth at *30 U.S.C. § 1260* (1982).

that its TMHP remained a general plan. Joe B. Maddox, Chief, Division of Tennessee Permitting, KFO, testified, "We didn't have the level of detail that we would need in order to make that finding [under 30 CFR 942.774.13(c) and 30 CFR 942.773.15(c)]" (Tr. 566).

The deficiencies that KFO found to be unaddressed in Rith's TMHP are set forth in KFO's final deficiency letter of July 25, 1988 (Exh. R-15). The deficiencies focus upon a plan to isolate potentially acidic shales in pods that would be compacted to minimize infiltration (Exh. R-3 at 4). KFO's letter relied heavily upon a report by the Eastern Field Operations (EFO) office, OSMRE, and noted the following deficiencies,[3] inter alia:

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[3] Concern was also voiced by the Environmental Protection Agency (EPA), who commented upon the TMHP by letter of Aug. 9, 1988 (Exh. R-18). EPA explained that its interest was the protection of surface water and groundwater from contamination by acid-mine drainage. The pod plan addressed by EPA below was initially devised by EFO:

"Conceptually we feel that the proposed isolation of toxic spoils in relatively impermeable pods on the mine site is feasible. However, problems associated with the use of on-site shale for pod liner material and site-specific hydrologic conditions will seriously limit the effectiveness of the proposed plan in preventing the formation of acid leachate that could degrade ground and/or surface waters.

"Our main concern at present is the assertion that the proposed waste handling plan will prevent saturation of the encapsulated toxic materials. Our evaluation of the hydrologic modeling presented in the assessment indicates that the hydraulic capacity of the sandstone underdrain and the shale backfill material around the pods will not be adequate to convey surface and groundwater infiltration and ensure that saturated conditions will

(continued...)

"Provide a detailed description of the operations plan showing how the conceptual model can be successfully implemented during mining and reclamation. The operations plan should include a description of the Whitwell shale blasting and excavation techniques assuring the minimum particle size is attained; contingencies made for the material segregation and temporary storage provisions; and material balances showing estimated swell and recompaction volumes of toxic material, non-toxic Whitwell shale, and Newton sandstone on an individual cut basis. * * *.

Provide, on an individual cut basis, a detailed description of pod construction techniques, and describe how positive drainage from the pod surface

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(...continued)

not occur. We believe it is likely that execution of the plan as proposed will result in saturation of the pods at least some of the time with the possibility that they will remain in a saturated condition. Under such conditions, toxic leachates will be generated since the liner material will not be totally impermeable.

"After evaluating the pod construction design, we do not believe that the permeability test results support the use of shale liners as a practical means of controlling leachate from toxic materials. Although the tests indicated that acceptably low permeabilities can be achieved with compacted, minus 1/4-inch shale particles, the tightly controlled laboratory conditions are unlikely to be duplicated in the field, especially with shale fragments as large as 6 inches. The proposed on-site test pad demonstration should provide better information on which to draw conclusions but only if test methods are altered to reflect actual pod construction conditions as noted in our technical comments."

will be ensured. Engineering drawings should be prepared * * * to depict plan views of each pod, and should provide individual pod dimensions and areal positioning relative to the mine site.

* * * * * * *

A demonstration must be provided to show the capability to perform the exacting compaction and selective materials handling practice that would result in the required permeabilities. * * *

* * * * * * *

Field observations of the current mine status indicate that a correction of the Sewanee coal seam cropline on your mining operations map is needed. * * * This incorrect cropline significantly affects the volumes of potentially acid forming shale * * *.

Provide a narrative with appropriate cross-references that discusses how the Newton Sandstone will be removed and stored; how the potentially acid-forming materials[4] will be removed and stored; how the Richland overburden will be removed and stored and then replaced to obtain a positive drain; how the Newton Sandstone will then be replaced as an underdrain; how and what material will be used for construction of the pads

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[4] "Acid-forming materials" are earth materials that contain sulfide mineral or other materials which, if exposed to air, water, or weathering processes, will cause acids that may create acid drainage. "Acid drainage" is water with a pH of less than 6.0 discharged from active or abandoned mines and from areas affected by coal mining operations. 30 CFR 710.5.

> for the placement of the compacted pods of potentially acid-forming material; how the potentially acid-forming material will be placed in pods and compacted; and where and what material will be used for four feet of non-toxic and non-combustible cover. Cut-by-cut descriptions should be provided * * * along with material balances for each type of spoil."

(Exh. R-15 at 3, 4).

In its response to KFO's deficiency letter of July 25, 1988, Rith acknowledged the presence of approximately 235,000 cubic yards of potentially acid-forming shale immediately above and below the Sewanee coal seam (Exh. R-19 at item 67.c). To prevent the formation of acid drainage, petitioner selected "an isolation and treatment approach." Id. Its TMHP, responding to KFO's deficiency letter, states in part:

> The shale layer under the Newton sandstone and approximately about 3 feet below the Sewanee seam will be removed by dozers with rippers, loaders, trucks or scrapers. This potentially acid forming shale may have to be loosened by careful blasting to facilitate handling. The removal of the acid shale shall be accomplished in a manner that promotes break up of the shale into as fine a particle size as possible. If the shale is ripped, it is to be cross ripped and tracked over several times to break the shale into particles with a maximum size of 4 to 6 inches. If blasting is necessary, a shot pattern that produces a minimum size particle will be utilized. It is recognized that the minimum sized shale particles produced will promote compaction to the desired standard.
>
> The pods will be constructed essentially as spherical segments to insure positive drainage from the compacted

surface. The diameter of segments will vary depending upon the quantity of acid material to be stored. The number and placement of segments will be determined from advanced drilling of each cut prior to mining.

(Exh. R-19 at item 67.c).

Rith also reviewed the probable hydrologic consequences of its TMHP and responded to KFO's deficiency letter in this manner:

The concept of minimizing contact of water with acid material disposed in compacted pods over a sandstone underdrain depends upon differential permeabilities between the areas around the pods and the compacted pods. To document the compactibility of the shale and the resulting impermeable nature of a compacted pod, laboratory determinations of permeability were conducted on the shale from the RITH ENERGY mine. * * *

The laboratory studies indicated that the shale material available from the mine site can be compacted to achieve permeability values that will minimize contact of water with acid material resulting in no anticipated impact on the hydrologic balance[5] due to the disturbing of potentially acid forming material during mining. The test results indicated that field compaction of acid material to a Proctor density that would result in a hydraulic conductivity of 5x10<-5>cm/sec or less should be the goal. To achieve the desired differential permeability around the pods, the resulting

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[5] "Hydrologic balance" is the relationship between the quality and quantity of inflow to, outflow from, and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the quantity and quality relationships between precipitation, runoff, evaporation, and the change in ground and surface water storage. 30 CFR 710.5.

hydraulic conductivity around the pods should be greater than 1x10<-3>cm/sec.

(Exh. R-19 at item 77.b.5).

As noted above, KFO's Maddox found that Rith's TMHP lacked the detail necessary to find that regulations 30 CFR 942.774.13(c) and 30 CFR 942.773.15(c) had been satisfied. At the hearing before Judge Torbett, OSMRE also presented evidence that Rith underestimated the volume of acid-forming material (Tr. 436-45). Such underestimation caused OSMRE to conclude that Rith's pods would be 58 percent undersized and, therefore, incapable of housing the toxic material (Tr. 445-46). Additional testimony was offered by OSMRE that temporary storage of toxic material would be necessary at certain cuts in the mining plan (Tr. 437-38).

In his decision, Judge Torbett found that "the clear weight of the evidence" showed that Rith significantly underestimated the volume of toxic material on-site. This fact and the further finding that a plan for temporary storage was necessary, but lacking, caused Judge Torbett to conclude that serious doubts existed that Rith could reclaim the site as required by law. The Judge also concluded that without a detailed operational plan it would be impossible for OSMRE to make a rational judgment as to whether Rith was in fact reclaiming the site as required.

Judge Torbett also focused on Rith's duty to demonstrate that its operation was designed to prevent material damage to the hydrologic balance outside the permit area, when considered with the probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area. 30 CFR 942.773.15(c)(5). The Judge quoted from James Hughes, a physical scientist employed by OSMRE, who testified that Significant

Revision No. 10 contained data "inadequate to make a complete determination of whether the proposed acid materials handling plan would adequately protect water quality" (Tr. 372).

OSMRE's concerns focused on the size, compaction, and permeability of shale particles that would be used to isolate potentially acid-forming materials from the Sewanee Conglomerate aquifer below. Specifically, OSMRE doubted whether a small enough particle could be achieved on-site and compacted to form an impermeable buffer between the toxic materials and percolating groundwater.

Judge Torbett found undisputed the presence of a highly acidic over-burden above and below the Sewanee coal seam that Rith intended to mine.[6] Also undisputed, the Judge found, was OSMRE's evidence of the potential acidity of the north side of the minesite. This finding was clear, the Judge noted, even though Rith argued that it had mined the Sewanee seam on the south side without evidence of acid mine drainage.

Regarding Rith's duty to prevent material damage to the hydrologic balance, 30 CFR 773.15(c)(5), Judge Torbett summarized his findings at page 26 of his decision:

> "The undersigned finds that the overburden on the north side of Applicant's permit was undeniably of a highly acidic nature. Unless Applicant could demonstrate that the pod concept would work, there would have been a high probability that there would be acid mine drainage into the Sewanee Conglomerate aquifer. Given the importance of

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[6] In addition to the Sewanee, Rith intended to mine the Richland coal seam.

> particle size to the issue of permeability of the pods, the undersigned finds that [OSMRE's] concerns for damage to the hydrology from Applicant's proposed toxic material handling plan were legitimate."

Testimony was also received at the hearing in support of Rith's argument that undue influence was brought to bear upon OSMRE by the involvement of the Environmental Protection Agency, various political figures, and intervenor Save Our Cumberland Mountains, Inc. (SOCM), in the administrative process. Judge Torbett found that petitioner had failed to provide substantial evidence of any undue influence in the decisionmaking process.

Based on our review of the record we find that the evidence supports Judge Torbett's decision that OSMRE properly denied Rith's application for permit revision.

In its statement of reasons on appeal, Rith stresses that OSMRE's concern for the high potential acidity of shales near the Sewanee seam is belied by the fact that "during the entire time Rith mined the Richland and Sewanee coal seams on the south side of its permit and through the 2-1/2 to 3 years since that portion of this site has been reclaimed there has been no acid mine drainage problem nor any evidence of any acid mine drainage problem" (Statement of Reasons, July 10, 1989, at 18). The potential for acid-mine drainage has not developed, Rith contends, because its originally approved manner of handling overburden and potentially acid-forming material, as used on the south side of the permit, has worked. Id. at 19.

Rith also contends that OSMRE has disregarded its own geologic conclusions concerning the impact of mining on groundwater. Even conceding that the geochemical data about the overburden of the Sewanee coal seam shows a greater potential for the development of acid water than

first determined,[7] petitioner states, the conclusions regarding the physical geology of the site remain unchanged. In two environmental assessments (EA's) prepared by the agency, one prior to permit suspension and one after, OSMRE determined that vertical movement of groundwater was "restricted by an impermeable strata," Rith notes (Exh. A-9 at 8). Quoting from the later EA, petitioner states,

The low transmissivity of the Pennsylvanian strata results in a low recharge rate to bedrock aquifers and minimizes or prevents circulation of ground water from the site with that in the bedrock aquifer. Thus, the impact of the proposed operation upon underlying Pennsylvanian aquifers would be small.

* * * Further elevation of iron and manganese concentrations because of the proposed mining operation is unlikely since underlying aquifers are protected from impact by a layer of impermeable shale.

Id. at 8-9.

Finally, petitioner argues that KFO incorrectly required a plan that was "designed to prevent leachates[8] from entering

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[7] As explained infra, Rith's permit application contained geochemical data that OSMRE found to be "diametrically opposed" to its own. Testing the shale zone above the Sewanee coal seam, OSMRE found potential acidity to be higher (250 percent difference) and neutralization lower (500 percent difference) (Exh. R-1). This disparity provoked an investigation by the Office of the Inspector General, U.S. Department of the Interior, who found no evidence of fraudulent analysis (Tr. 121).

[8] "Leachate" is a liquid that has percolated through soil, rock, (continued...)

the surface and ground water" and that would allow KFO "to make a finding that there will be no adverse impact to the hydrologic balance" (Statement of Reasons at 22, quoting from Exhs. A-2 and A-3 (emphasis added by Rith)).[9] Both SMCRA and the regulations clearly recognize that the standards demanded by KFO are impossible of achievement for any coal mine, Rith contends.

In support of this argument, petitioner cites *30 U.S.C. § 1265*(b)(10) (1982), which states:

> "(b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to --
>
> * * * * * * *
>
> (10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by --
>
> (A) avoiding acid or other toxic mine drainage by such measures as, but not limited to --
>
> (i) preventing or removing water from contact with toxic producing deposits;

(...continued)
or waste and has extracted dissolved or suspended materials. 30 CFR 710.5.

[9] These exhibits are letters from KFO to William Ring of Rith Energy, Inc., dated June 20 and 27, 1986, respectively.

(ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;

(iii) casing, sealing, or otherwise managing boreholes, shafts, and wells and keep acid or other toxic drainage from entering ground and surface waters * * *. [Emphasis added.]"

Petitioner also points to 30 CFR 816.41(b) and (d), which state:

"(b) Ground-water protection.

(1) Ground-water quality shall be protected by handling earth materials and runoff in a manner that minimizes acidic, toxic, or other harmful infiltration to ground-water systems and by managing excavations and other disturbances to prevent or control the discharge of pollutants into the ground water.

* * * * * * *

(d) Surface-water protection.

(1) Surface-water quality shall be protected by handling earth materials, ground-water discharges, and runoff in a manner that minimizes the formation of acidic or toxic drainage; prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution." [Emphasis supplied.]

Rith argues that the criteria by which a TMHP should be judged is not the absolute prevention of leachates or the absolute prevention of adverse impacts, but rather a

minimization of disturbance to the hydrologic balance and no substantial adverse impact (Statement of Reasons at 24).

Petitioner's first argument, addressing the absence of acid-mine drainage in the south side of the permit, is answered by the testimony of Willis Gainer, Chief, Branch of Southern Coal Fields, KFO. When questioned whether such drainage would be apparent if there was a handling problem, Gainer replied:

> "A We have seen, in the typical mining situations in Tennessee, where acid problems have developed. It takes two to three years following mining, sometimes up to five years, for an acid seep to develop.
>
> It depends on the rainfall and the saturation process of the backfill how soon it fills up and seeps out through the fill itself.
>
> * * * * * * *
>
> * * * We believe that there is a limited amount of toxic material, acid forming material disturbed on the south side.
>
> Our geologists indicated that in some -- at least, one of them did -- he saw the toxic material actually pinched out above the coal seam, which would mean a reduced amount of toxic material or acid forming material was there to be disturbed."

(Tr. 174, 219).

Alfred Whitehouse, Deputy Assistant Director of Program and Technical Support, OSMRE, also testified to the likely effect that drought conditions had on the south side, noting that no discharge had occurred anywhere from the site (Tr. 610). The testimony of Gainer and Whitehouse suggest that

it may be too soon to conclude that petitioner was successful in avoiding acid drainage on the south side of the permit. We find that OSMRE's concerns are well founded. The absence of any present acid mine drainage does not mean that acid mine drainage will not occur in the future. Moreover, the record shows that a larger amount of toxic material has been identified on the north side of the permit area, which is the subject of the revised plan. Petitioner's first argument is, accordingly, rejected.

Rith's second argument, i.e., that OSMRE's decision contradicts two prior EA's regarding the vertical movement of groundwater, is similarly unpersuasive. When questioned about the original EA, KFO's Maddox testified that it was based on data submitted by Rith, which data was later determined to be unrepresentative of the actual geology of the minesite. The effect of this unrepresentative data "rendered the original environmental assessment as it relates to the toxic material invalid because it was based upon information that was not representative" (Tr. 533-34; see also Exh. R-1).

With respect to the second EA, which Rith correctly notes was issued after its permit was suspended, Gainer testified that this EA (and accompanying finding of no significant impact (FONSI)) addressed only Rith's plan to relocate a county road on the minesite and mine the Richland coal seam underneath (Tr. 224). Maddox agreed, stating that the EA was limited to the impacts of relocating the road (Tr. 533).

As OSMRE examined more closely the geology of the minesite, its views of the permeability of rock overlying the Sewanee Conglomerate aquifer changed. Thus, James Hughes testified, when asked about the shale stratum immediately above the aquifer, "As far as the Whitwell

Shale beneath the Richland coal [is concerned], in the course of mining [and] blasting that is necessary during mining we tend to fracture that, and as a result that would facilitate the vertical percolation of water through the shale unit (Tr. 947).

The testimony of Maddox and Gainer offers plausible reasons for the contradictory conclusions reached by the EA's and KFO's denial of Significant Revision No. 10. Additional testing necessitated by the agency's inquiry into the permeability of the Whitwell Shale is a further plausible reason. OSMRE must be free to correct statements in its EA's when new data requires it; to do otherwise is to perpetuate error. Petitioner's showing of inconsistency does not demonstrate error in the agency's final course of action.

Petitioner's ultimate argument challenges the standard that OSMRE used in evaluating Rith's TMHP. As noted above, Rith contends that OSMRE used too stringent a standard and should instead have sought to minimize disturbance to the prevailing hydrologic balance, as set forth at *30 U.S.C. § 1265*(b)(10) (1982) and 30 CFR 816.41(b) and (d).[10]

---

[10] In its statement of reasons at 2, Rith charges that OSMRE adopted such a standard and required a much more complex TMHP because of "pressure from SOCM." While it is clear that SOCM opposed approval of Rith's TMHP, to the extent that Rith is asserting that SOCM acted improperly in doing so, there is no evidence in the record to support such an assertion. As Willis Gainer testified:

"Under the public review process, they have the opportunity to comment. We are required to take all public comments received into consideration.

(continued...)

A careful reading of the applicable statutory and regulatory language reveals that OSMRE is directed to "minimize the disturbances to the prevailing hydrologic balance" by taking a variety of actions. One of these actions is "by avoiding acid or other toxic mine drainage." *30 U.S.C. § 1265*(b)(10)(A) (1982) (emphasis added). Measures of avoidance are set forth by statute, and the first of these is achieved by "preventing or removing water from contact with toxic producing deposits." (Emphasis added.) Id. Thus, the statute, as properly read, requires the agency to minimize disturbance to the prevailing hydrologic balance by avoiding acid or toxic mine drainage. Minimizing the contact of water and toxic-producing deposits, as argued by petitioner, is not the standard. See also *30 U.S.C. § 1265*(b)(14)(1982) and H.R. Rep. No. 218, 85th Cong., 1st Sess. 114, 174 (1977).

Petitioner finds some support for its position in 30 CFR 816.41(b) and (d), quoted supra, but overlooks 30 CFR 816.41(f), the regulation specifically addressing acid- and toxic-forming materials. This regulation states in part:

> "(f) Acid- and toxic-forming materials. (1) Drainage from acid- and toxic-forming materials into surface water and ground water shall be avoided by --
>
> (i) Identifying and burying and/or treating, when necessary, materials which may adversely affect water quality, or be detrimental to vegetation or to

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(...continued)

"So, from the standpoint that they have provided comments, a lot of them in technical areas, we do look at them and address them and make sure that if a regulations [sic] require them that the plan covers them." (Tr. 181).

public health and safety if not buried and/or treated, and

(ii) Storing materials in a manner that will protect surface water and ground water by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water." [Emphasis added.]

Further support for OSMRE's action in this case is set forth in the preamble to this regulation, which states in part:

The final rule requires that the drainage from acid- and toxic-forming material be avoided by identifying, treating or burying, and, when necessary, burying and treating such materials in order to prevent adverse effects to water quality, to vegetation, or to public health.

See *48 FR 43956, 43979* (Sept. 26, 1983).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Torbett is affirmed as modified.[11]

Gail M. Frazier, Administrative Judge

CONCURBY: HARRIS

I concur: Bruce R. Harris, Administrative Judge.

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[11] Judge Torbett incorrectly stated at page 23 of his decision that the burden of persuasion shifted to Rith when OSMRE made out its prima facie case. Regulation 43 CFR 4.1376 provides that the ultimate burden of persuasion rests with the applicant for a permit revision, i.e., Rith. The burden of persuasion does not shift from party to party. McCormick on Evidence § 336 (3d ed. 1984). The evidence is such that this error does not alter the result in this case; the Judge's decision may be affirmed, but as modified in this regard.

Appendix F – Opinion and Decision, United States Department of the Interior, Office of Hearings and Appeals, Before an Administrative Law Judge, dated March 28, 1989

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

March 28, 1989

Docket No. NX 89-1-PR

RITH ENERGY, INC.,

Applicant

v.

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT (OSMRE)

Respondent

Application for Review of
Denial of Permit Revision

OSMRE Permit No. 2583

DECISION

Appearances: Michael W. Boehm, Attorney for Applicant, Chattanooga, TN

Peter Alliman, Attorney for Intervenor, Save Our Cumberland Mountains (SOCM), Madisonville, TN

J. David Clayton, Attorney for Respondent, Office of the Field Solicitor, Knoxville, TN

Charles Gault, Attorney for Respondent, Office of the Field Solicitor, Knoxville, TN

Before: Administrative Law Judge Torbett

Background

This proceeding reviews OSMRE's Knoxville Field Office's (hereinafter KFO) decision denying Significant Revision No. 10, submitted by Rith to modify its Permit No. 2583 located on the southern end of Walden Ridge in Bledsoe County, Tennessee. Although not subject to review here, several earlier decisions by KFO are important to a complete understanding of the dispute at bar. Rith obtained a mining permit from KFO in January, 1986 based upon information submitted in its original application, including a toxic materials handling plan much less complex and less detailed than the plan now under review. Thereafter, the agency suspended a portion of Rith's permit, after receiving and reviewing data that showed significantly greater volume and acidity in the toxic material on Rith's site (R-1, 33, 34). The suspension persists until Rith submits and KFO approves an adequate toxic materials handling plan. Significant Revision No. 10 is the most recent of several toxic material handling plans submitted by Rith in an effort to have the suspension lifted (R-9, 11, 15). Significant Revision No. 10 was ultimately denied and this litigation ensued (R-15).

Pursuant to Section 514 of the Surface Mining Control and Reclamation Act (the Act), 30 U.S.C. § 1264 *et seq.*, the Applicant filed an Application for Review of the den-

ial of Significant Revision No. 10 with the Office of Hearings and Appeals. A six-day hearing was conducted by the undersigned beginning on January 26, 1989, in Chattanooga, Tennessee. Pursuant to the directions of the undersigned, briefs were filed by the parties and the intervenor prior to the receipt of transcripts. Portions of those briefs will be used without attribution, where appropriate.

Summary of the Evidence

The record in the proceeding consists of over 1,000 pages. Respondent's evidence consisted of the testimony of various expert witnesses and employees of OSMRE, including Willie Gainer, Robert Welsh, Eric Perry, James Hughes, and Richard Mann, as well as the introduction of documentary exhibits numbered and entered R-1 through R-34. Applicant's evidence consisted of the testimony of various experts and employees of OSMRE, including Joseph Maddox, Al Whitehouse, and Robert Harrison, the testimony of Rith engineer Terry Miller, the President of Rith, William Ring, and a representative of the Ferguson estate, Mark Herndon, as well as the introduction into evidence of documentary exhibits numbered and entered A-1 through A-12.

The events that led up to the denial on August 30, 1988, by KFO of Rith's Significant Revision No. 10 began on July 9, 1986. A chronology of those events will be summarized prior to the presentation of the testimony.

On July 9, 1986, Rick Mann, a geologist with OSMRE stated in a memorandum to Willis Gainer, Chief of KFO, that after KFO had collected samples from an open pit on the south side of the Rith site on March 26, 1986, and had those samples analyzed, the results proved to be diametrically opposite to those submitted by Rith in

that the shale zone above the Sewanee coal was the opposite of that reported in the application. The potential acidity was much greater (250% difference), and the neutralization was near zero (500% difference) (R-1). Because of these findings KFO required Rith to take further geologic samples from the north side of the permit, and those results, after analysis, showed:

1. The shale zone above the Sewanee coal seam to the base of the Newton Sandstone had a high potential acidity.

2. A zone of pyritic shale, which also has a high potential acidity, extended to a depth of approximately 3 feet below the Sewanee coal seam.

3. Samples taken by Terra Agua Resources Engineers (TARE), Inc., [Rith's engineer], although they did show the same potentially acidic zones, had results which were substantially lower in potential acidity and sulfur values.

4. No material sampled by OSMRE or TARE, Inc., bore any resemblance to that submitted in the original application for the Rith Energy site.

(R-1)

Based on the above findings, Rith's permit was suspended, and Rith began the process of seeking an acceptable revision.

On May 29, 1987, Rith met with the KFO team to discuss the resumption of mining on the north portion of the permit. At that meeting, KFO stated that the permit had been suspended because Rith had presented data on site conditions that were not representative of site conditions and as a result their toxic material handling plan was inappropriate and inadequate (R-2). Rith was told that they could provide the information needed

to process a significant revision for a toxic materials handling plan with isolation being identified as the best option, or demonstrate that the handling method used on the south side of the site was working by drilling a minimum of three ground-water wells in the backfilled materials (R-2).

Rith's response to this meeting was to send, on July 29, 1987, a revision of their toxic-material handling plan (R-33). KFO responded on September 4, 1987, that the plan while administratively complete could not be approved because it was technically inadequate:

> You also again indicated in your telephone conversation with Willis Gainer on August 31, 1987, that you do not plan to supply any further information for the proposed revision. As mentioned before, the proposed revision is technically inadequate. This revision has not added any further information than the previously submitted revision application that was denied on July 2, 1987. . . . . If you continue to take the position of not supplying needed information, the revision cannot be approved as submitted.

(R-33)

On November 13, 1987, KFO again informed Rith that Rith's October 22, 1987 update to the toxic-material handling plan was technically deficient:

> As we have previously discussed, the acid forming material must be isolated either in a dry environment above a fluctuating water table, or below the zone of fluctuation of the backfill water table.

Rith then sought the assistance of OSMRE's Eastern Field Operations Center (EFO) in Pittsburgh, Pennsylvania, for help in coming up with a technically acceptable toxic handling material plan. As a result of Rith's

request, EFO sent IFO a conceptual plan on January 6, 1988, that involved an isolation approach of constructing pods above the water table, in which the toxic material would be isolated with an impermeable layer of crushed shale on the bottom and an impermeable cap of non-toxic alkaline material on the top (R-3). Eric Perry of EFO, who had conceived the design, telefaxed the design to Rith, along with fifteen comments prepared by KFO to which Rith would have to respond prior to the development of a workable operational plan (R-4). Key amongst those fifteen comments were:

> 3. Want to-scale drawings certified by professional engineer.
>
> 4. Quantity of potentially toxic material. Either conservatively assume 10 feet of material identified in drillholes already analyzed or test overburdened 1-2 cuts ahead of mining.
>
> 6. If any potentially toxic spoil is to be temporarily stored, where and how much will be stored?
>
> 7. Sandstone under drain would like to see size gradation on sandstone larger rock on bottom of drain, smaller rock at top of drain.
>
> 8. Recharge to backfill from snow and runoff could be significant in winter and spring. Concerned that ground water elevations could rise high enough to contact acid shale and generate bad water. Would like to see the minimum 4 foot thick sandstone layer increased to say 8 feet.
>
> 9. Would like to see overall more detail in plan submission.
>
> 10. Zone of nontoxic shale over pods should also be compacted to 90% proctor density. . . .

Please consider these comments in preparing your plan for submittal.

(R-4)

On January 15, 1988, Rith submitted Significant Revision No. 10, including a new toxic material handling plan based on the EFO conceptual design (R-5). The Significant Revision was immediately forwarded to KFO's permitting review team. The team included: Gary Tucker, team leader, Jim Hughes, hydrologist, Rick Mann, geologist, and David Lane, engineer. Eric Perry and Robert Welsh of EFO assisted the the team in reviewing the Significant Revision (Tr. 56, 57). On February 19, 1988, EFO after evaluating Rith's submission wrote KFO the following:

There are three principal issues of concern:

1. The quantity of potentially acid forming material to be handled,

2. The feasibility of compacting the pods of potentially toxic material to a permeability significantly less than the surrounding fill, and

3. A hydrologic budget analysis which indicates that acid drainage would be generated under the currently proposed plan. . . .

The applicant indicated that approximately 195,000 cubic yards of potentially acid material will be disturbed and disposed, whilc calculations generated by your office suggest an amount of 400,000 cubic yards is an appropriate estimate. . . . We agree that the estimates developed by your staff are a more realistic appraisal of the qutntities of material requiring special handling, and the plan should reflect this. . . .

Since the majority of engineering opinion suggest that compaction efforts would not be effective, we agree

that it would be prudent to consider the placement of a low permeability cap over the pods to minimize infiltration. . . .

The hydrologic budget and mass balance analyses are based on several assumptions which may not be valid. . . . the back calculated hydraulic conductivity coefficient, therefore, may not be valid. A more intensive analysis would be required to model the hydrologic conditions of the site. . . .

(R-8)

After concluding that the proposed Significant Revision was technically inadequate, KFO on February 25, 1988, sent Rith its first technical review deficiency letter, stating that a wide variety of technical information was lacking that was essential to making the plan operational (R-9). Amongst items specifically requested by KFO were:

There are conflicting calculations between OSMRE and the applicant as to the volumes of material to be handled. . . . Determine that adequate material is available from the swell of cuts 23, 24, 25, 26, 27 to back fill 28. . . . Provide a cross section through this area showing the premining surface, postmining surface. . . .

The plan for the underdrain is not clear. Provide the slope of the drain. . . .

It appears that temporary stockpiling of material will be necessary. . . . If temporary stockpiling is required, indicate the areas on the mine plan map. . . .

Provide documentation on the volumes of potentially acid-forming materials. . . .

Data in the application are inadequate to determine whether the proposed acid materials handling plan pro-

> vides for adequate protection of the water hydraulically downgradient in the Sewanee Conglomerate aquifer form acid mine drainage. . . .
>
> The uncompacted backfill will be characterized by a somewhat random distribution of rock types and size classes that will allow for discrete areas of relatively high hydraulic conductivity and conduit type flow. . . .

(R-9)

On March 4, 1988, Mr. Ring and Rith's consultant, Mr. Terry Miller, met with KFO's technical review team and Eric Perry to discuss the deficiencies outlined in the first deficiency letter (Tr. 69). On March 16, 1988, Rith's consulting firm, TARE, Inc., submitted Rith's response to the technical deficiencies outlined in the first deficiency letter of February 25, 1988 (R-10).

On March 25, 1988, KFO sent Righ its second technical deficiency letter reiterating generally the same deficiencies cited in the first technical deficiency letter (R-11). Key items in Respondent's letter included the following:

> Response to deficiency item 63.f says no temporary stockpiling is necessary. It appears that temporary stockpiling will be necessary in mining cuts 23 through 32. . . .
>
> Spoil volume calculations based on drill hole data and cross sections tend to show that temporary storage and handling of acid forming material will be required in cuts 26 through 31. There are inadequate storage volumes in each cut. . . . Revise your handling plan to discuss how this excess material will be stored, handled, and disposed. . . .

> Revise this item to indicate the presence of potentially acid producing shale immediately beneath the Sewanee Coal seam. The response indicates that only the shale layer above the Sewanee coal seam may be toxic material. . . .
>
> Provide a detailed discussion of testing procedures that were utilized to determine permeability rates of compacted shale. . . .
>
> The permeability rates obtained from laboratory testing of shale are considerably lower than rates typically associated with compacted the uncompacted rockfills. Provide detailed discussion regarding methodology that will be utilized in the field (including equipment) to duplicate laboratory conditions that yielded the low permeability rates for shale. . . .

(R-11)

In a letter dated March 24, 1988, TARE forwarded its response to KFO's second deficiency letter. TARE's response predated the second deficiency letter because KFO had earlier advised TARE by telephone of the contents of the second deficiency letter. TARE's third submission was contained in R-12.

On July 25, 1988, KFO sent Rith its third and final technical deficiency letter. In that letter reference is made to a report by EFO on July 22, 1988: "This report concludes that the conceptual plan proposed in your revision is feasible. The report also concludes that more information is needed in order to determine whether the proposed plan can be successfully implemented at your site. For example laboratory testing indicates that the shale material at your mine site can be compacted to acceptable permeability rates; however, you should now be able to demonstrate that those rates can be achieved

by your mining operation." (R-15) Further: "Enclosed is a list of deficiencies that must be addressed by your plan. . . . If you have not provided all required information by August 24, 1988, your revision request will be denied." (R-15) Key items in the extensive list of requirements that had not yet been provided included the following:

> Provide a detailed description of the operations plan showing how the conceptual model can be successfully implemented during mining and reclamation. The operations plan should include a description of the Whitwell shale blasting and excavation techniques assuring the minimum particule size is attained; contingencies made for the material segregation and temporary storage provisions; and material balances showing estimated swell and recompaction volumes of toxic material. . . .
>
> Provide on an individual cut basis, a detailed description of pod construction techniques, and describe how positive drainage from the pod surface will be ensured. Engineering drawings should be prepared. . . .
>
> A demonstration must be provided to show the capability to perform the exacting compaction and selective materials handling practice that would result in the required permeabilities. . . .
>
> Field observations of the current mine status indicates that a correction of the Sewanee coal seam cropline on your mining operations map is needed. . . . This incorrect cropline significantly affects the volumes of potentially acid forming shale. . . .

(R-15)

On August 1, 1988, KFO sent Rith revisions in the EFO document made necessary because of minor changes

in calculations. That letter also extended the response date by which Rith was to met the continuing technical deficiencies, from August 24, to August 31, 1988 (R-16).

After completing the final technical review of Significant Revision No. 10 (R-19) as amended by TARE's response dated August 30, 1988, Respondent's review team concluded that the proposed revision remained technically inadequate. Consequently KFO issued a denial letter on September 6, 1988, citing 30 C.F.R. §§942.774.13-(c) and 942.773.15(c) (R-20).

The Testimony of Willis Gainer

KFO presented its case-in-chief through the testimony of Willis Gainer, Chief of OSMRE's Southern operation in Knoxville. Gainer testified that R-1 was an internal KFO memorandum issued on July 9, 1986, that pointed out substantial discrepancies between Rith's toxic material estimates in its original permit submission and those that KFO had determined actually existed (Tr. 35-42).

Gainer then introduced R-2, a June 3, 1987 memo from Gainer concerning the summary of a meeting of May 29, 1987. This meeting was held between representatives of KFO and Rith. The exhibit showed that KFO and Rith went through the information that KFO required for a technically sufficient submission for a toxic material handling plan on a point by point basis (R-2). The meeting was called to clear up any ambiguities between KFO and Rith (Tr. 44-46). Subsequent to this meeting, Rith contacted EFO in Pittsburgh, seeking help for a new toxic material handling plan. A mine site visitation was held on November 30, 1987, after which EFO developed the pod concept for disposal of the toxic material (Tr. 47).

Gainer then introduced R-3 which was the conceptual plan provided by EFO to KFO on January 6, 1988. Gainer testified that after the November 30, 1987, mine site visit, KFO had a meeting on December 17, 1987, with Eric Perry, the geologist who designed the plan, regarding the specific information needed to make the plan operational (Tr. 49, 50). Those points were memoralized in the handwritten memo (R-4), which was transmitted by Perry to Rith. On January 14, 1988, Rith submitted its revised plan (R-5), which followed the conceptual plan, but according to Gainer did "little more" (Tr. 57). On January 25, 1988, Rith requested an informal conference (R-7). During the technical review process taking place at KFO, there was concern that the review team calculated almost twice as much toxic material on the mine site as had TARE's professional engineer (Tr. 63). On February 10, 1988, EFO sent KFO a memorandum expressing Pittsburgh's concerns about what information should be included in KFO's deficiency letter to Rith (R-8). The principal deficiencies were the volume of toxic material to be handled and the adequacy of temporary storage of toxic material (R-9). Gainer testified that "the general consensus was that it [the Rith submission] remained inadequate. The plan itself was still a general conceptual type plan with limited site specific data, and limited detailed engineer type plans that Knoxville Field Office needed in order to make the decision that it was technically adequate and that reclamation could be achieved" (Tr. 72).

When Rith submitted R-10 to KFO for review, Gainer testified that KFO placed Rith's submissions in a hardship category to facilitate an immediate review by the same review team. Gainer testified that the second submission by Rith was unresponsive to KFO's second

deficiency letter: "we conducted the review of the second response . . . and again found deficiencies in the plan, particularly looking for more specifics as far as engineering details and design plans." (Tr. 75)

The third plan submitted by Rith on March 24, 1988, again obtained priority review by KFO in close consultation with Rith. KFO, in consultation with EFO again reached a general consensus that specific data requirements were necessary and that there was need for lab data in order to demonstrate the workability of the conceptual plan (Tr. 81-83).

Gainer testified that at about this time KFO received requests from Senators Sasser and Gore to allow EPA to review the plan before approval (Tr. 82). EPA attended the informal conference and visited the site on April 11, 1988, and on May 6, 1988, when samples were taken for the Corps of Engineer testing (Tr. 83).

Gainer testified that EPA had serious concerns regarding both the specific design and the operational aspects of the plan (Tr. 84). EPA's evaluation of the plan was presented in R-13:

> Several seeps were evident in the highwall, contributing to standing water impounded in the pit. The seeps appear to be derived from fractures in the Whitwell shale; the explosed shale could readily be seen to be fractured, as would abe expected. . . . Due to the observed seeps at the site, it seems likely that water will discharge from the highwall into the backfilled pit after reclamation.
>
> We have serious concerns regarding both the specific design and the operational aspects of the plan.
>
> . . . it is difficult to conceive of an operational plan by which extensive double-handling of material could be avoided.

> As you can see, the current state of knowledge regarding the conceptual design contained in the TMHP is such that more questions have been generated by its proposal than existed prior to its conception.
>
> Since no other sites where this type of construction exists have been identified, much more than a mere conceptual design is needed to insure protection of the ground water resource, especially in such an area as Walden Ridge where alternate water supplies (in the form of other, well protected aquifers or public water supplies) are not available.

(R-13)

On July 25, 1988, KFO issued its third deficiency letter (R-15) and stated therein that KFO was willing to meet with Rith as often as necessary to insure that there was complete understanding as to what information was needed (Tr. 88). The deficiencies in the letter track a report that EFO had generated in response to the Rith submission. Gainer testified that the EFO Report and the deficiency letter went hand in hand, and reiterated the specific deficiencies in terms of amount of toxic material, permeability of the shale coping under the pods, the problem of no provision for temporary storage of toxic material, the lack of an operational plan for mining the site, etc. (Tr. 86-90) KFO met with Rith on August 1, 1988, and went over the deficiencies line by line (R-17, Tr. 92).

On August 9, 1988, EPA sent in its final comments on the plan after reviewing the results of Corps of Engineer's lab data and the EFO report on this data. The EPA evaluation stated:

> While we agree that the design is conceptually feasible using the shale material, we do not agree that the test

results support the design as a practical or cost-effective means of controlling leachate from the toxic materials.

In summary with respect to the hydrologic model, we disagree with the conclusions to the effect that the encapsulated toxic material will remain unsaturaed. It is likely that the pods will be in saturated conditions for at least a portion of the time and perhaps continually. Under saturated conditions, toxic leachate will be generated, as the liner materials will not be totally impermeable.

Based on the available information we do not believe that implementation of the proposed toxic materials handling plan will achieve the desired results of protecting surface or groundwaters from acid leachate originating on the Rith Energy, Mine No. 1 site after mining is completed. . . .

(R-18)

Gainer testified that when Rith submitted its final response on August 30, 1988, the consensus was that "Rith remained non-responsive" to prior deficiency letters (Tr. 97).

On September 6, 1988, KFO denied the revision (R-20; Tr. 98). As Gainer stated, the "denial was based upon the fact that we could not make a finding that the application was complete and accurate, nor did it demonstrate the reclamation as required by the Act and the Federal Program of Tennessee could be accomplished." (Tr. 98)

On cross-examination Gainer testified that the Rith permit had definitely received more attention than any permit with which he had been involved and that this was because the mine site and permit were "precedent set-

ting" (Tr. 101, 136). When asked why KFO had taken more than sixty days to make a decision after the informal conference, Gainer testified that the period took longer than expected because EFO and the Corps of Engineers were involved in the process. This involvement was at Rith's request and was to help provide information to Rith to enable it to obtain a permit to mine the site. Gainer further testified that there was an initial difference of opinion between KFO and EFO as to the condition of the site, but that the differences of opinion were ultimately resolved (Tr. 165). He further testified that samples of shale tested for Rith by Geotek were "weathered" shale which would not be typical of the material that would be used to construct the pods (Tr. 170). Since this needed information had not been supplied by Rith, KFO's only alternative would have been to deny the revision request before the lab results were in. Gainer testified that he did not feel that either he or KFO had been improperly influenced by Save Our Cumberland Mountains (SOCM) (Tr. 182).

Upon redirect examination, Gainer testified that the mine site contained one of the highest levels of acid material thad he had ever seen, nationwide, in nine years of looking at hundreds of permits (Tr. 217). He further testified that the lack of acid mine drainage on the south side of the permit was probably due to the limited amount of material disturbed and the drought which had been effect in the area for several years (Tr. 219). Gainer testified that the data on toxic material submitted with Rith's original application, which was later determined to be incorrect, was the responsibility of Rith (Tr. 220). He further testified that Rith was advised that the EFO plan was conceptual or generic in nature and that it was Rith's responsibility to come up with an operational

plan (Tr. 222). Gainer then stated that the environmental assessment or Finding of No Significant Impact (FONSI) that stated there was "no significant impact" pertained to a road revision request by Rith and cold not be extrapolated to a "no significant impact" condition for the entire 89 acre permit (Tr. 223). Finally, Gainer testified that the permitting process in this case had been drawn out over three years because of Rith's failure to provide detailed information and responses to KFO's deficiencies (Tr. 226).

Testimony of Robert Welsh

Robert Welsh, a geologist with OSMRE's Eastern Field Operations Center (EFO) was called as an expert witness by Respondent. Welsh testified that Rith's information on the pod concept tested only the suitability of the material for the proposed use, not the workability of the plan (Tr. 266). He stated that the materials delivered by Rith to Geotek, the testing lab, were "non representative" (weathered Whitwell shale) of the material that would be used to construct the pods and that the difference would be critical" (Tr. 266). He testified that the Corps of Engineers tests which were performed on non weathered Whitwell shale that was collected from the highwall on the site, were representative and showed that the success of the conceptual plan (permeability) depended greatly on the particle size used (Tr. 269). The Corps tests showed ten times greater permeability using the szme size particles as the Geotek tests and ten thousand times greater permeability using sizes of one inch (Tr. 269). The Rith plan had proposed using sizes up to six inches. Welsh further testified that while there was no direct mathematically linear relationship between particle size and permeability, larger par-

ticle size generally meant greater permeability, and hence greater percolation of water through the toxic material in the pods (Tr. 270). As Welsh concluded:

> One of the main conclusions was that more information of a site-specific nature would have to be gathered to adequately characterize the success of the toxic materials handling plan. It was conceptually valid. However, due to the factor of particle size, we felt that more testing would have to be done, in the form of on-site pad construction, to adequately give an accurate estimate of the larger particle size of that material and expected permeability results.

(Tr. 271)

Welsh stated that the mining plan submitted, particularly with regards to the toxic materials handling plan, was of such little detail that "it was very difficult to really come to much conclusion about the actual operation." (Tr. 278)

The Testimony of Eric Perry

Respondent then called Eric Perry, an agronomist of OSMRE's EFO in Pittsburgh. Perry testified that there was a "very high probability" that the material on the Rith site would produce acid mine drainage (Tr. 293). Further he stated that he was responsible for the conceptual toxic material handling plan by which the toxic material was to be isolated on the site in pods (Tr. 294). He testified that he met with the KFO staff on December 13, 1987, to review all possible means of handling the toxic materials and to select the approach most appropriate for Rith's site (Tr. 296). He advised Mr. Ring upon sending the plan to Rith that it was nothing more than a conceptual or generic plan, and that Rith would have to respond in detail to all of the 15 points

outlined by KFO (Tr. 297). He further stated that he later helped draft the deficiencies of February 19, 1988, because of the lack of information supplied by Rith (R-8, Tr. 300). He had concern for the "potential impacts" to the Sewanee Conglomerate aquifer should acid mine drainage occur (Tr. 302). He was at the March 4, 1988, meeting with Rith and discussed the deficiency letter "line by line" (Tr. 303). He was of the opinion that the March 16, 1988, submission by Rith did not meet all the deficiencies outlined by KFO and that the submission was still incomplete (Tr. 303). He further testified that he had several telephone conversations with Terry Miller of TARE, and Rith's engineer, and that he clarified the deficiencies, and never suggested that his conceptual plan was complete by itself (Tr. 305). He testified that his involvement with the situation ended in April, 1988 at the time Bob Welsh came on board (Tr. 306).

Perry testified that he was not aware of any other applicant who had received as much assistance from OSMRE as had Rith (Tr. 307). He stated that in his opinion the site would have groundwater infiltration and an appropriate plan was necessary at the site to insure that acid mine drainage did not become a problem. He testified that Rith's computation of the volume of toxic materials on the site was probably incorrect, and there would probably be considerable problems with toxic materials volume on the site itself (Tr. 320). Perry stated that the specific detailed information KFO was requesting of Rith was not unreasonable, and could be supplied without drilling the entire site (Tr. 319). He testified that he did not think that Rith's plan was workable until all the deficiencies were satisfied (Tr. 334). While the concept for the site was workable, Rith never did the necessary technical specifications to make it complete (Tr. 335, 36).

The Testimony of James Hughes

James Hughes, a physical scientist with KFO, was called as an expert by Respondent (Tr. 343). He introduced R-21, which was KFO's data from the three core drill holes on the mine site itself which showed "high potential acidity" (Tr. 345). He then introduced R-22, R-23 and R-24 which were charts that he had drawn for the hearing that graphically showed the differences between the original data submitted by Rith and the subsequent data developed by KFO on the amount of potential toxic material on the site (Tr. 252). He stated: "The representation of all three holes shows substantially more potential acidity in that zone above and below the Sewanee coal than was indicated in the previous analysis prior to original permit issuance." (Tr. 354).

Hughes then introduced R-25, copies from the Rock Creek Environmental Impact Statement, a closely related geological area three miles form the Rith site. He stated that the geologic make-up of Rock Creek and the Rith mine site are similar and showed "extremely low alkalinity" with little or no buffering material (Tr. 356). Hughes then introduced R-26, a USGS report, showing similar geologic conditions with the mine site, and R-27, which showed regional water quality problems with acid mine drainage on Walden Ridge (Tr. 360-63, 370). Hughes testified that he was a part of the review team that composed the February 25, 1988, deficiency letter to Rith, and that in his professional opinion the deficiencies were not addressed by the Rith response (Tr. 372-373). He further testified that if the volume of toxic material calculated by KFO was accurate, there probably was not room for the pod plan at the mine site if the site was returned to approximate original contour (Tr. 373). He characterized the material on the

mine site as "highly acidic" (Tr. 378). He stated that Rith had been non-responsive to several of the hydrology concerns that he had expressed. "In particular, there were questions regarding the amount of compaction necessary to sufficiently lower hydrologic conductivity of the acid pods to prevent substantial amount of water from entering the acid pods." (Tr. 372). He stated that there were deficiencies as to "disposal areas for these acid pods [which] should be located away from surface drainways in order to avoid the infiltration and excessive wetting of disposal areas for the acid material" (Tr. 373) Hughes concluded that the regulations prefer technologies that prevent acid mine drainage rather than those that treat it and that OSMRE generally does not accept perpetual treatment as an acceptable plan (Tr. 415). Hughes testified that the Rith site had potential for acid mine drainage into the Sandstone aquifer and the Sewanee Conglomerate aquifer (Tr. 424), and that pre-Act mining had resulted on ongoing acid mine drainage into the creeks on the Walden Ridge area (Tr. 426).

The Testimony of Richard Mann

Respondent then called Richard Mann, a geologist from OSMRE's KFO permitting division as an expert witness (Tr. 434). Mann had developed R-29, a thickness contour map of the site. He testified that the "current highwall shows Sewanee coal in several places" and that a visual inspection of the crop line did not correspond to the information submitted by Rith (Tr. 442, 443). He testified that the open pit paralleled Rith's crop line which does not correspond to reality, and that this discrepancy accounts for most of the differences between the volume computations of Rith and Respondent (Tr. 443, 444).

Mann was responsible for the geologic portion of the first deficiency letter. He noted the deficiencies as to the volume of potential acid forming material and discrepancies between Rith's estimate and KFO's (Tr. 436). He was of the opinion that the large volume of potential toxic material would require a plan for temporary storage, an eventuality that Rith was unwilling to plan for (Tr. 437). He testified that these basic deficiencies in geologic information were unmet by Rith's final submission (Tr. 438).

Respondent then introduced R-30, showing the approximate location of the mining site plan. Mann testified, that in his professional opinion and using Rith's volume of toxic material for the site, there was insufficient room to store the toxic material (Tr. 415). As he stated:

> Based on 370,000 cubic yards of material, and there are ninety seven pods there . . . there are actually fifty-eight percent undersized for that number of pods, which means that they would either have to have twice as many pods or building the pods twice as big which they cannot do because of the physical constraint of the mining cuts. The mining cuts are seventy foot wide, there's supposed to be a ten-foot spacing between pods, so if you chop five foot off each side of the pod for that you've reduced your pod area. . . .

(Tr. 446)

Mann identified R-31 as the Rith mining plan map which was submitted with Rith's August 30, technical response to KFO's third deficiency letter. He noted the cuts that were proposed for no toxic material pods (Tr. 450). Sic cuts would have to be accommodated on the

rest of the already cramped site (Tr. 452). Mann described the similarities between the Rock Creek area and the Walden Ridge South area and stated that there was a consistent zone of toxic material within the Whitwell shale in those areas (Tr. 460). Mann testified that he was involved in the decision to deny the Rith permit and that Rith had been unable or refused to supply the specific information needed by KFO (Tr. 452). Mann reiterated that Rith's final proposal to drill to determine toxic volume on an on-going basis, cut by cut, would not work, because the shear volume of waste could not possibly be handled on the site (Tr. 468). He stated that his calculations to determine the amount of waste were based on three drill holes on the north side of the site, the extant highwall on the south side of the site, and all the other data on the South Waldens Ridge (Tr. 469). At the end of Mann's testimony, Respondent rested its case-in-chief, and Rith, the Applicant, presented its case.

There were a number of issues raised by Applicant in its effort to rebut the Respondent's prima facie case. Generally speaking, they concerned such issues as whether Applicant's relative success with reclamation on the south side of the permit provided a basis for extrapolation to the entire 89 acre permit; whether Respondent's FONSI made with Applicant's request for a significant revision to allow mining under the road that transsected the permit, could be extrapolated to make a similar finding for the entire permit; whether and to what effect the supposed conflict between EFO and KFO on the nature of Applicant's submissions met the specific requirements and standards of the Act for reclamation on the site; and finally, whether there was undue pressure brought to bear on the administrative process by political figures and by citizen groups, especially SOCM.

The Testimony of Joseph Maddox

Maddox, the chief of OSMRE's KFO division of permitting since 1984, testified that in that capacity he was ultimately responsible for making the decision on whether to grant or deny the permit revision of September 6, 1988 (Tr. 495). Maddox testified that the permit revision was denied based on the merits of the case and not because of any improper or illegal influence by SOCM (Tr. 505, 511). Maddox stated that no one from SOCM ever threatened to sue him or KFO over the permit, but that Rith had threatened to sue on several occasions (Tr. 541). Maddox agreed that to his knowledge no other permit in Tennessee had been suspended because of acid mine drainage (Tr. 508).

Maddox testified that he had arranged for the March 4, 1988, meeting at which he asked each of the technical staff team members whether they had other questions or other outstanding unresolved issues with Rith (Tr. 510). He explained, however, that the purpose of the meeting was "to determine if those issues had been addressed. We did not at that time attempt to make any technical analysis of it." (Tr. 510)

Maddox agreed that his staff had gone beyond the sixty day procedural requirement for giving Applicant a formal response after the public hearing on April 11 (Tr. 512). However, he stated that members of his staff were constantly in touch with Applicant on this matter during that time span (Tr. 512).

Maddox agreed that between Applicant's submission on August 30, 1988, and Respondent's rejection on September 6, 1988, that he, Maddox, had had a meeting in his office with SOCM representatives (Tr. 514, 541). He stated: "SOCM was telling me their concerns

about the deficiencies that still existed." They were trying to determine from me what our decision was going to be." (Tr. 514, 571, R-32) Maddox stated that KFO would inform Rith of its decision before informing anyone else (Tr. 571).

Maddox conceded that the toxic material handling plan required from Applicant was amongst the most eomplex that had been required from any permittee so far in Tennessee (Tr. 515). Maddox stated that the plan to be approved would have to be designed so that it could meet performance standards (Tr. 518). He refused to agree that KFO was requiring a "prohibitory" standard from Applicant that would require Applicant to prevent any acid mine drainage whatsoever (Tr. 518). Instead he stated: "the basis for denying the plan [was not that there was no guarantee that it would prevent all acid mine drainage] but the fact that we didn't have even enough information to determine if they could handle the material." (Tr. 420)

He stated that Respondent determined to deny the permit rather than issue another deficiency letter on September 6, 1988, because the process had gone on for over two years, and Applicant "didn't take the opportunity to meet with us to assure that they would provide a technically adequate plan by that date." (Tr. 521)

Maddox testified that Applicant's Exhibit No. 9 concerned an environmental assessment that was limited to the permit revision associated with relocating the county road on the south side of the permit. Maddox stated that it was not intended to give a "no significant impact" status to the entire 89 acres (Tr. 533). Further, that the original Environmental Assessment was rendered invalid because it was based on material submitted in Rith's original permit package that was later clearly

shown to be inaccurate, if not intentionally misleading (Tr. 534).

Maddox testified that there were several areas of deficiency that the Applicant never successfully and fully addressed. When asked whether the problem concerning the amount of toxic material on the site could not be addressed on an on-going basis during the mining of the site, he responded: "The problem with that . . . is that the Act and regulations require us to make those determinations prior to approving a permit, and if we allow this to happen, we could not make that determination prior to approving." (Tr. 559). When asked what was unreasonable about Applicant's plan, he responded: "Well, the point is we don't have enough information to determine what is going to be done from then on, and we have to make a finding that the plan can be conducted, and if we don't have the information, there is no way we can make those findings." (Tr. 562) He later amplified that the criteria being applied by KFO was that from the Act and regulations, that "no application for permit revision shall be approved unless the application demonstrates and a regulatory authority finds that reclamation as required by the Act and the regulatory programs can be accomplished . . . under §773.15(c)". . . . (Tr. 564), and that Applicant had never supplied detail to allow KFO to make that finding (Tr. 566).

The Testimony of Al Whitehouse

Applicant then called Al Whitehouse, deputy assistant director for Technical Assistance and Reports in OSMRE's EFO as a witness (Tr. 589). Whitehouse testified that he originally did not think there was a problem at the site, but that was because he had "just heard one side of the story" (Tr. 592).

As to whether he might have mislead Mr. Ring, Applicant's President into believing that EFO would make the decision in this case, he stated: ". . . I explained to him [Mr. Ring] that it is not my decision to make, that I am not in permit approval chain of command, and that my responsibility is to provide technical assistance which was requested by the Knoxville Field Office and by Bill [Ring]." (Tr. 593)

As to the nature of the plan that EFO devised for Applicant, Whitehouse stated that it was a "workable" plan and the conceptual plan was but a "framework" (Tr. 596). He noted that at the very inception of the pod idea, EFO had sent Applicant a series of questions to which Rith must respond on how they were going to implement and use the plan (Tr. 597).

Whitehouse agreed that there had been intra-agency debate about the plan that EFO had devised (Tr. 599). However, he stated that such debate was neither unusual nor unhealthy (Tr. 599).

Whitehouse testified that he had concurred in the permit denial, because "the things that in fact were missing are still in fact missing." (Tr. 600) He went on to amplify that statement noting that there were "real operational problems of materials handling that need to be addressed." (Tr. 602)

When Whitehouse was asked why Applicant's experience with reclamation on the south side of the permit could not provide a basis for an acceptable indication of no problems on the north side, Whitehouse responded, "you have been in a period of severe drought. Also, there is no way to tell what infiltration has taken place and where in fact that water has gone and what the chemistry of that water is should it be laying in against the highwall. . . ." (Tr. 608)

The Testimony of Robert Harrison

Applicant then called Robert Harrison, chief of the Branch of Inspection for OSMRE's KFO since September, 1985. He testified that he was not aware of any other permit suspensions for toxic material problems other than Rith's (Tr. 615). This was in response to Applicant's introduction into evidence of a log of all toxic material violations since June of 1984 (A-8). He further testified that the existence of effluent violations would in no way indicate the presence of toxic materials on a site, because "effluent violations" and "toxic" violations can be written for a number of different reasons and that most "toxic" violations pertain to situations such as tipples, etc. (Tr. 617, 619)

Harrison testified on the critical requirement for an inspector that there be a detailed, operational plan provided by the permittee (Tr. 621). He stated, in response to a question on how the inspector would know what to look for on a permitteee's site, as follows: "The approved permit package. The inspector in essence is doing no more than implementing or overseeing the recipe or the procedures laid out by the permit package . . . (and) it is very critical, because those people, their backgrounds are varied and to provide them with the essential tools to objectively identify what the prescription is, they just could not operated effectively without that (a detailed operational plan)". (Tr. 621)

The Testimony of Terry Miller

Applicant then called its registered professional engineer, Terry Miller of TARE, Inc., as a witness (Tr. 625). Miller reviewed in detail the chronology of events from OSMRE's KFO February 25, 1988 deficiency letter and

Rith's response to the September 6, 1988 rejection of the permit by OSMRE's KFO (Tr. 630-35). He noted that he had been a participant in every meeting held between Applicant and Respondent (Tr. 633). He testified that in his opinion each of the meetings with KFO, such as the March 4, 1988 meeting had resolved all outstanding problems (Tr. 634). Yet, after each meeting, Applicant was required to go back and submit additional detail and specifications (Tr. 635). He stated that after Applicant's submission on March 24 (R-11, 12), it was Miller's understanding that ". . . at this point in time that my response to those deficiencies would satisfy everybody and that at that time Pittsburgh [EFO] was closely involved in the decision and that Pittsburgh would make sure that this got approved (Tr. 635).

Miller stated that with each new deficiency letter the requirements became more complex and the degree of information required was increasing (Tr. 637). Miller's response to KFO's increased requirements for detail was to suggest to Applicant an in-the-field ongoing approach. He stated: "My attempt was to respond to each deficiency in a fashion that would provide the information needed in the context of a continuing surface mining activity, which is the reason for the ongoing drill program to verify the quantity of acid material and the reason for the construction of the test there." (Tr. 637). As to the problem of determining in advance of mining what quantity of toxic material existed on the site, Miller testified that such would be determined on an ongoing basis, and if the actual volume mined exceeded the capability of Rith to dispose if it, ". . . it would be a violation of the mining plan and you would have to stop where you were." (Tr. 638, 639)

On the problem of providing a cut by cut sequence on the pods, Miller stated that he felt his plan showed the "cut by cut" requirement "schematically" and that details would be provided once mining began and would be continuously provided on an ongoing basis (Tr. 648). When queried specifically on how Applicant would develop an operational plan for the sequencing of pod construction, Miller responded:

> Q. So let me see if I understand you, this was a representational drawing and during the operation your idea was to provide in an ongoing fashion OSM the exact details?
>
> A. That is correct. . . .
>
> Q. Is it fair to say that your approach to this toxic material handling plan was to tell the agency we can do it and if we run into any problems out there in the field we will let you know about it?
>
> A. That is an oversimplification, but I wouldn't mind that.

(Tr. 648, 649)

When asked how inspectors could identify problems with only a "representational" drawing, Miller stated that he though there was enough detail in his plan (Tr. 650). He agreed that the plan submitted by him for Applicant did not include drawings of the proposed pods, but would have to be supplied on an "as built" basis (Tr. 565). However, he felt that this was adequate given the fact that the south side of the permit, including the supposedly toxic Sewanee seam, had been mined and reclaimed two years previously and that no acid mine drainage had been yet detected (Tr. 656). As he stated: "it is true that this plan is sort of a proof as in the pudding, that's true, but in my opinion OSMRE is taking

a head in the sane type of approach to it unwilling to go ahead and do something on site. They are nit-picking this project to death." (Tr. 657)

On cross examination, Miller agreed that he did not know how much toxic material had been disturbed on the south side of the mine site (Tr. 658). He further agreed that for OSMRE KFO to successfully monitor this site it would be necessary for it to have an inspector on site initially at most times to insure that the mining was properly performed (Tr. 661, 664). Miller testified on some of the operational problems that Applicant might encounter:

> Q. Do you have any idea of how many linear feet of cut could be accomplished at this site within a month's period of time?
>
> A. No.
>
> Q. Your submittal doesn't address that either, does it?
>
> A. I don't think so.
>
> Q. There is no way to know then how much material would be encountered or how many pods could be built within a month's period of time?. . . .
>
> A. At the present time without knowing the specific spread of equipment that was going to be used on site, that is true.

(Tr. 660)

The Testimony of Bill Ring

Applicant then called William (Bill) Ring, President of Rith Energy to testify. He stated that he had pre-committed the coal contracts form the site before the got a

permit to mine (Tr. 701). He stated that when the permit was suspended, he called Carl Close of OSMRE's EFO in August, 1986 and that Close directed KFO to get with Terry Miller and produce an approvable plan (Tr. 702, 703).

On the question of influence and attempted leverage, Ring testified that he contacted Tennessee' senators and representatives, as well as several OSMRE officials concerning approval of the plan. He testified that OSMRE was caving in to pressure from SOCM (Tr. 702). Further that the SOCM attorney appeared to have special access to the KFO staff, especially Willis Gainer (Tr. 708). He further testified that Gainer had told the SOCM attorney that the third revision would be denied prior to that denial being told to Rith (Tr. 709). He claimed that the permid had been predetermined because of the pressures brought to bear on IFO by SOCM (Tr. 711). Ring testified that at one point Maddox had admitted that SOCM pressure was the key to shutting the site down (Tr. 721). Ring testified that the KFO hierarchy was afraid of a suit from SOCM (Tr. 722).

Ring testified that his experience on the south side of the permit with no acid mine drainage after two years of reclamation, was a valid indication that his toxic handling plan would work (Tr. 716). The success of that plan was proven by the series of dry drill holes showing that there was not even any underground water on the site (Tr. 717).

Ring described in detail the process by which the Pittsburgh EFO came up with what everyone thought was an acceptable plan (Tr. 727). The 15 points of R-4 were hashed over to everyone's satisfaction, or so he thought (Tr. 727). Ring testified that Eric Perry implied to Ring that the plan was a final one, and only needed a few cos-

metic changes to bring it into shape (Tr. 731). He described the March 4, 1988 meeting with KFO at which there seemed to be an agreement on the deficiencies of the plan (Tr. 732). After the meeting, Ring was told by the Pittsburgh EFO that KFO was waffling under political pressure (Tr. 733).

Ring stated that after the April 11, public hearing, he was again assured by Willis Gainer that everything was on tract (Tr. 737, 739). On April 22, Ring learned from Whitehouse of EFO that KFO had cooked up a "scheme" to turn the plan down (Tr. 740). Ring testified that from the time of the public hearing, KFO dragged their feet, failing to respond in the required 60 days (Tr. 740), all the while giving Ring several different, misleading stories (743). Ring, during this period, kept in touch with EFO and his contacts there kept assuring him that the permit would be approved (Tr. 746).

Ring testified that in early July EFO informed him that SOCM was putting pressure on Congressmen to deny the permit (Tr. 747). Ring stated that at that point Senator Sasser's office requested that EPA get involved (Tr. 750). Ring stated that he was getting two different stories, one from KFO and one from EFO as to what was needed on the permit, or whether a period would eventually issue (Tr. 751). Carl Close of EFO corroborated Ring's fears that he was being singled out, or so Ring testified (Tr. 751). From March 25 to July 25, 1988, Ring testified that he heard nothing from KFO about any deficiencies (Tr. 752). Ring felt that new demands for specificity were required in the third deficiency letter (Tr. 753). Whitehouse of EFO informed Ring in late July that he would have to meet those deficiencies if he expected to get the permit (Tr. 754). Ring testified that on August 1, he met with KFO to discuss the deficiencies, and that between that meeting and the ulti-

mate denial Ring drilled another "dry" test well on the south side of the permit, further proving that there was no acid mine drainage problem on the permit (Tr. 756). Finally, Ring was informed on August 22, that the EPA comments would not be considered in awarding the permit, and at that point, he set about answering the final deficiency (Tr. 758). He stated that he felt that the third deficiency letter made new and unexpected requirements on Rith and that his plan met the requirements as to the test of the pod concept and as to determining the volume of toxic material on the site (Tr. 760). He repeatedly emphasized that he should not be required to conduct a research project for KFO.

On cross examination, Ring agreed that Rith had been treating discharge water from the mine site (Tr. 772). He further stated that he was trying to go around the KFO permitting process by going to the Tennessee senators and representatives, as well as EFO (Tr. 778). However, he stated that he did that only after he got the run around from KFO, and when he felt that he was being dealt with unfairly by KFO. (Tr. 779).

On cross examination, Ring testified that he had indeed drilled one hole on the south side that did have water in it and that he had not tested that water nor informed KFO of that fact (Tr. 784). Ring testified that the original information submitted with the permit was correct as to the potential acidity of the Sewanee seam, and that anyone could go on a site and find whatever they close depending on where they selected rocks (Tr. 786, 787).

Ring testified that it was his position that he was unfairly singled out because he was required to do more than other operators on similar sites (Tr. 826). He testified that his position had always been that Rith had

produced a toxic materials handling plan for the original permit, and that a new toxic handling plan was not necessary (Tr. 827). Ring agreed that the Rith site was the first mine in which he had been involved as an operator (Tr. 848).

The Testimony of Mark Herndon

Mark Herndon, a representative of the heirs of the mine site in question in this proceeding was called as a witness by Applicant. He testified that he and members of his family had written several letters to the governor of Tennessee, senators, and congressmen in seeking to have the permit revision approved (Tr. 670). He testified that he attempted to get OSMRE KFO to either let Rith mine the site or "condemn" the minerals and pay us" (Tr. 692).

At this point, Applicant rested its case.

Many of the same witnesses were called again by Respondent, and their testimony was largely duplicative and cumulative. Joe Maddox restated his position that he had not been unfairly influenced by SOCM (Tr. 856, 857, 880). He stated that EPA involvement did not affect the timing of the permit denial (Tr. 858). Maddox introduced letters from Sasser and Gore (R-35, 36, 37) to show the nature and scope of congressional inquiry, and to respond to the assertion by Rith of undue political influence (Tr. 874).

Willis Gainer was called in rebuttal and he explained that he had told the SOCM attorney that the Rith plan would not be approved as submitted, and not that the plan would not be approved at all (Tr. 905). Concerning the "pre-determination" issued raised by Ring, Gainer testified that KFO had processed ten revisions for Rith, seven of which were approved, and so Rith was well

aware of the process and time required for the approval process, and that technical review was not a verbal process (Tr. 907). Gainer testified that when Rith submitted its third revised plan, KFO had considered denying the revision "flagrantly" (a flagrantly deficient plan or a plan with a fatal flow), because of the lack of information submitted by Rith (Tr. 906, 925).

James Hughes was called by Respondent in rebuttal, and he testified that in his opinion the seeps documented on the north side of the site proved that there would be groundwater infiltration in the site itself (Tr. 939). He stated that the Whitwell shale of approximately 10 feet in thickness would be fractured in mining and that water would percolate through this toxic material and possibly flow down into the aquifer below (Tr. 947).

Al Whitehouse was called in rebuttal by Respondent and explained again that he had informed Ring that KFO was the permitting authority for this site and that Pittsburgh (EFO) would only supply technical information (Tr. 956). With that the Respondent rested its case.

Issues

Several issues are presented for consideration. They include: 1) What burden of proof should be applied? 2) What legal standard governs Respondent's decision to deny the proposed Significant Revision? 3) Did Applicant present substantial evidence that reclamation as required by the Act and regulations could be accomplished under its proposed Significant Revision? 4) Did Applicant present substantial evidence in its proposed Significant Revision that it could prevent hydrologic damage outside the permit area? 5) Did Applicant present

substantial evidence that the administrative decision making process of Respondent had been tainted by improper influence?

Discussion, Findings and Conclusions

The burden of proof to be used by the Undersigned is the same as that applied in Recommended Decision, dated June 24, 1983, *NRDC, et al. vs. OSMRE,* IBSMA 81-83. The Act established no applicable burden of proof in proceedings concerning the administrative review of the issuance of a surface mining permit. Consequently, the undersigned in this review is bound by those procedural rules set out in the Administrative Procedure Act and the general and applicable specific rules relating to procedures and practice before the Hearings Division of the Office of Hearings and Appeals as contained in subparts B and L, part 4 of Title 43 C.F.R. In *Steadman v. SEC,* 450 US 81, 97, *re-hearing denied,* 451 U.S. 933 (1981), the Supreme Court held that, absent a specific statement in the agency's organic statute, the adjudicatory proceedings under 5 U.S.C., Section 554 are governed by the procedural rules contained in 5 U.S.C., §556. The court relied on subsection D which states: "A sanction may not be imposed or rule or order issued accept on consideration of the whole record or those parts therefore cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence.*" *Id.* 98. Thus, once Respondent has made out a prima facie case, the burden of persuasion shifts to Applicant who must present substantial evidence to rebut Respondent's prima facie case.

The legal standard governing Respondent's decision to deny Applicant's proposed Significant Revision is

contained in 30 C.F.R., Part 774. Applicable provisions in Part 774 include the specific mandate that:

> no permit revision be approved unless the application demonstrates and the regulatory authority finds that reclamation as required by the Act and the regulatory program can be accomplished, applicable requirements under 773.15(c) which are pertinent to the revision are met, and the application for a revision complies with all requirements of the Act and the regulatory program.

30 C.F.R. §774.13(c)

Applicable requirements under §773.15(c) include the following:

> (c) Written findings for permit application approval. No permit application or application for a significant revision of a permit shall be approved unless the application affirmatively demonstrates and the regulatory authority finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, the following:
>
> (1) The application is complete and accurate. . . .
>
> (2) The applicant has demonstrated that reclamation as required by the Act and the regulatory program can be accomplished under the reclamation plan contained in the permit application.
>
> (3) The regulatory authority has made an assessment of the probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area, and has determined that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

Under this standard, the Applicant must demonstrate three things: 1) that the application is complete and accurate; 2) that under the proposed revision, reclamation can be accomplished in accordance with applicable requirements; 3) that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

The first question is whether Applicant demonstrated by substantial evidence that reclamation could be accomplished under its proposed revision. The Respondent's expert witnesses uniformly stated that they could not conclude from the information provided by Applicant in its proposed revision that the site could be properly reclaimed. The information about proposed reclamation was deficient in two respects. First, Applicant significantly underestimated the amount of toxic material that would require encapsulation in pods on the site. Secondly, Applicant failed fully to explain the cut sequence and backfilling sequence to be used during reclamation.

The accuracy of Applicant's estimate of the volume of toxic material to be encapsulated was vitally important. Respondent's data showed that the volume of toxic material to be encapsulated exceeded the space available to store the material in the proposed pods. Applicant failed to provide a detailed operational plan containing a cut and backfilling sequence in the reclamation process. Respondent estimated that given the shear volume of toxic material, and the fact that some cut sequences contained no plans for pods, there would have to be temporary storage of the toxic material.

Applicant failed to present substantial evidence to rebut Respondent's contentions as to the volume of toxic material on the site, the necessity of a detailed operation plan for cut and backfilling sequences, and the necessity

of a temporary storage plan. Applicant's engineer did not challenge the Respondent's estimations or present countervailing evidence. Instead, Applicant proposed to determine the amount of toxic material on the site on an ongoing basis. Applicant proposed to provide the volume calculations after, not before the Significant Revision was approved. Applicant also contended that its experience in reclaiming the south side of the permit should provide a basis for belief that the north side could be similarly reclaimed.

The undersigned finds that the clear weight of the evidence shows that Applicant significantly underestimated the volume of toxic material on the site and that an accurate estimate of that volume gives rise to genuine doubts whether Applicant could properly reclaim the site under the proposed Significant Revision. The undersigned also finds that Applicant's proposed cut and backfilling sequences would require a plan for temporary storage of toxic material, an eventuality Applicant refused to consider or plan. It is therefore, apparent that serious doubts exist as to Applicant's ability to reclaim the site as required by the Act and regulations. Further, without a detailed operational plan it would be impossible for Respondent's inspectors to make a rational judgement on whether Applicant was in fact reclaiming the site as proposed.

The second question is whether Applicant's proposed Significant Revision was designed to prevent off-permit damage to the hydrologic balance. During presentation of Respondent's prima facie case, its expert witnesses testified that the Significant Revision contained data "inadequate to make a complete determination of whether the proposed acid material handling plan would adequately protect water quality." (Tr. 372) The

Respondent was concerned that the Applicant demonstrate that under the pod concept there could be sufficient compaction, and that the pods would be sufficiently impermeable that there would not be acid drainage form the site into the Sewanee Conglomerate aquifer below.

Serious questions were raised about the compaction of the nontoxic Whitwell Shale material proposed by Applicant to create an impermeable buffer between the toxic material and percolating groundwater. There was conflicting evidence on whether non-weathered shale that would actually be used in the pods, could be compacted sufficiently to form an impermeable liner. There was also considerable doubt on whether a small enough particle size could be achieved onsite. Respondent's data showed that the larger the particle size the greater the permeability, and hence the greater the likelihood that water would seep through the supposedly impermeable buffer. Given Respondent's serious reservations about the impermeability of the pods, Applicant proposed to conduct an on-site test of the design. However, the test pod was never constructed because Applicant failed to respond to other deficiencies, and so never obtained conditional approval to test the concept.

Respondent's experts, Mr. Eric Perry and Mr. James Hughes, both testified that there was a high probability that acid mine drainage would form on Applicant's site in the absence of an effective toxic material handling plan. It was not disputed that there was a highly acidic overburden above and below the Sewanee seam. There was also evidence that there was a high propensity for acid mine drainage in the vicinity of the South Walden Ridge area. Applicant did not contest Respondent's evidence on the potential acidity of the north side of

the mined site. Instead, Applicant argued that it had mined the Sewanee seam on the south side, and drill holes there were yet to show any acid mine drainage.

The undersigned finds that the overburden on the north side of Applicant's permit was undeniably of a highly acidic nature. Unless Applicant could demonstrate that the pod concept would work, there would have been a high probability that there would be acid mine drainage into the Sewanee Conglomerate aquifer. Given the importance of particle size to the issue of permeability of the pods, the undersigned finds that Respondent's concerns for damage to the hydrology from Applicant's proposed toxic material handling plan were legitimate.

The third major issue for resolution is whether Applicant showed by substantial evidence that the administrative process was prejudiced by undue influence. Applicant repeatedly urged at the hearing that Respondent's decision was fatally flawed by various improprieties that were alleged to have occurred during the three year long decision-making process.

Applicant's allegations of impropriety included the following: 1) that Environmental Protection Agency involvement was improper; 2) that political inquiries by various political figures flawed the process and brought improper pressure; 3) that SOCM improperly influenced Respondent's decision; and 4) that the interaction between the Knoxville Field Office and the Eastern Field Office was improper and misleading.

Applicant failed to provide substantial evidence that there was any undue influence on the decision-making process. Undeniably, SOCM was included throughout the process. Its members lived within walking distance

of the mine site and were rightly concerned about the effect of mining on their water quality. The Act provides for citizen participation. While there was some attempt to influence Respondent both for and against approval of the Significant Revision, testimony of Respondent's witnesses was unequivocal that their decision was not improperly influenced by such contacts.

Respondent's officials also testified that the involvement of the EPA had no impact on their decision. EPA involvement in the review process was extremely limited, and it occurred under a valid legal basis. It did not change the Respondent's decision in any particular.

Applicant's contention that there was improper interaction between the Eastern Field Office and the Knoxville Field Office is without merit. While it is possible that Applicant was whip-sawed between the two, and that there was disagreement between the two, there is no basis for finding that the intra-agency interactions here were illegal or improper. The Eastern Field Office became involved at the request of Applicant. The EFO's expert witnesses consistently testified that Applicant's Significant Revision was properly denied because of a lack of adequate technical information and of a detailed operational plan. EFO had told Applicant that the generic or conceptual plan that it developed required substantial site specific engineering detail from Applicant to make it workable. The undersigned therefore finds that there was no improper or undue influence exerted during this administrative process.

Applicant's proposed Significant Revision No. 10 was intended to present a toxic materials handling plan adequate for the toxic overburden on Applicant's site. The evidence proves that the overburden had a high propensity to produce acid mine drainage. The

clear weight of the evidence also shows that Applicant's plan would not accomplish the necessary reclamation of the site, nor would it prevent damage to the hydrologic balance. The undersigned therefore holds that the Respondent properly denied Significant Revision No. 10 and its subsequent revisions.

Order

The undersigned hereby sustains Respondent's denial of Applicant's Significant Revision No. 10 and subsequent revisions.

/s/ David Torbett
David Torbett
Administrative Law Judge

Appeal Information

This decision may be appealed in accordance with the applicable provisions contained in 43 C.F.R. Subtitle A, Part 4, Subpart L, Section 4.1100 through 4.1394, Special Rules Applicable to Surface Coal mining Hearings and Appeals.

Appendix G -- Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*:

33 USCS § 1311 (2001) Effluent limitations.

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [*33 USCS §§ 1312,* 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

33 USCS § 1342 (2001) National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [*33 USCS §§ 1328,* 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [*33 USCS § 1311*(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [*33 USCS §§ 1311,* 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [*33 USCS §§ 1251* et seq.]. [* * *]

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [*33 USCS § 1314*(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State

shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist: [* * *]

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program. (1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) [304(i)(2)] of this Act [*33 USCS § 1314*(i)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) [304(i)(2)] of this Act [*33 USCS § 1314*(i)(2)]. [* * *]

(k) Compliance with permits. Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505 [*33 USCS §§ 1319,* 1365], with sections 301, 302, 306, 307, and 403 [*33 USCS §§ 1311,* 1312, 1316, 1317, 1343], except any standard imposed under section 307 [*33 USCS § 1317]* for a toxic pollutant injurious to human health. [* * *]

33 USCS § 1370 (2001) State authority.

Except as expressly provided in this Act [*33 USCS §§ 1251* et seq.], nothing in this Act [*33 USCS §§ 1251* et seq.] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act [*33 USCS §§ 1251* et seq.], such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act [*33 USCS §§ 1251* et seq.]; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Appendix H – – Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 *et seq*:

30 USCS § 1201 (2001) Congressional findings.
The Congress finds and declares that– [* * *]
(e) surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this Act is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations;[* * *]

30 USCS § 1202 (2001) Purpose.
It is the purpose of this Act to– [* * *]
(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;

30 USCS § 1256 (2001) Permits.
(a) Persons engaged in surface coal mining within State; time limit; exception. . . . [N]o person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program or by the Secretary pursuant to a Federal program;

30 USCS § 1257 (2001) Application requirements.[* * *]
(b) Submittal; contents. The permit application shall be submitted in a manner satisfactory to the regulatory authority and shall contain, among other things– [* * *]

(11) a determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site, with respect to the hydrologic

regime, quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the regulatory authority of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability: Provided, however, That this determination shall not be required until such time as hydrologic information on the general area prior to mining is made available from an appropriate Federal or State agency: Provided further, That the permit shall not be approved until such information is available and is incorporated into the application;

30 USCS § 1265 (2001) Environmental protection performance standards. [* * *]

(b) General standards. General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to–[* * *]

(10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by--

(A) avoiding acid or other toxic mine drainage by such measures as, but not limited to--

(i) preventing or removing water from contact with toxic producing deposits;

(ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;

(iii) casing, sealing, or otherwise managing boreholes, shafts, and wells and keep [keeping] acid or other toxic drainage from entering ground and surface waters; [* * *]

30 USCS § 1271 (2001) Enforcement.

(a) Notice of violation; Federal inspection; waiver of notification period; cessation order; affirmative obligation on operator; suspension or revocation of permits; contents of notices and orders. [* * *]

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act [*30 USCS §§ 1201* et seq.] or any permit condition required by this Act [*30 USCS §§ 1201* et seq.], which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm. [* * *]

(5) Notices and orders issued pursuant to this section shall set forth with reasonable specificity the nature of the violation and the remedial action required, the period of

time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies. Each notice or order issued under this section shall be given promptly to the permittee or his agent by the Secretary or his authorized representative who issues such notice or order, and all such notices and orders shall be in writing and shall be signed by such authorized representatives. Any notice or order issued pursuant to this section may be modified, vacated, or terminated by the Secretary or his authorized representative. A copy of any such order or notice shall be sent to the State regulatory authority in the State in which the violation occurs: Provided, That any notice or order issued pursuant to this section which requires cessation of mining by the operator shall expire within thirty days of actual notice to the operator unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of public hearing. [* * *]

(c) Civil action for relief. The Secretary may request the Attorney General to institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the surface coal mining and reclamation operation is located or in which the permittee thereof has his principal office, whenever such permittee or his agent (A) violates or fails or refuses to comply with any order or decision issued by the Secretary under this Act [*30 USCS §§ 1201* et seq.], or (B) interferes with, hinders, or delays the Secretary or his authorized representatives in carrying out the provisions of this Act [*30 USCS §§ 1201* et seq.], or (C) refuses to admit such authorized representative to the mine, or (D) refuses to permit inspection of the mine by such authorized representative, or (E) refuses to furnish any information or report requested by the Secretary in furtherance of the

provisions of this Act [*30 USCS §§ 1201* et seq.], or (F) refuses to permit access to, and copying of, such records as the Secretary determines necessary in carrying out the provisions of this Act [*30 USCS §§ 1201* et seq.]. Such court shall have jurisdiction to provide such relief as may be appropriate. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure [28 USCS Appx, Rule 65], as amended. Any relief granted by the court to enforce an order under clause (A) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this title [*30 USCS §§ 1251* et seq.], unless, prior thereto, the district court granting such relief sets it aside or modifies it.

30 USCS § 1292 (2001) Other Federal laws.

(a) Construction of *30 USCS §§ 1201* et seq. as superseding, amending modifying, or repealing certain laws. Nothing in this Act [*30 USCS §§ 1201* et seq.] shall be construed as superseding, amending, modifying, or repealing the Mining and Minerals Policy Act of 1970 *(30 U.S.C. 21a),* the National Environmental Policy Act of 1969 *(42 U.S.C. 4321*-47), or any of the following Acts or with any rule or regulation promulgated thereunder, including, but not limited to– [* * *]

(3) The Federal Water Pollution Control Act (79 Stat. 903), as amended *(33 U.S.C. 1151*-1175), the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality.

Appendix I -- Tennessee Water Quality Control Act of 1971, Tenn. Code §§ 69-3-101, et seq. (2001):

§ 69-3-101. Short title.

This part shall be known as the "Water Quality Control Act of 1977."

§ 69-3-103. Definitions

As used in this part, unless the context otherwise requires: [* * *]

(22) "Pollution" means such alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of this state including, but not limited to, changes in temperature, taste, color, turbidity, or odor of the waters that will:

(A) Result or will likely result in harm, potential harm or detriment of the public health, safety, or welfare;

(B) Result or will likely result in harm, potential harm or detriment to the health of animals, birds, fish, or aquatic life;

(C) Render or will likely render the waters substantially less useful for domestic, municipal, industrial, agricultural, recreational, or other reasonable uses; or

(D) Leave or likely leave the waters in such condition as to violate any standards of water quality established by the board; [* * *]

(33) "Waters" means any and all water, public or private, on or beneath the surface of the ground, which are contained within, flow through, or border upon Tennessee or any portion thereof except those bodies of water confined to and retained within the limits of private property in single ownership which do not combine or effect a junction with natural surface or underground waters;

§ 69-3-108. Permits

(a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

(b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

(1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;

§ 69-3-114. Causing pollution or refusing to furnish information.

(a) It is unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in § 69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

(b) In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or to fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information,

plans, specifications, or other data required by the board or the commissioner under this part.

(c) The plea of financial inability to prevent, abate, or control pollution shall not be a valid defense under the provisions of this part.

Appendix J – – Code of Federal Regulations:

30 CFR 715.14; § 715.14 Backfilling and grading.

In order to achieve the approximate orginal contour, the permittee shall, except as provided in this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to eliminate all highwalls, spoil piles, and depressions. Cut-and-fill terraces may be used only in those situations expressly identified in this section. The postmining graded slopes must approximate the premining natural slopes in the area as defined in paragraph (a). [* * *]

(j) Covering coal and acid-forming, toxic-forming, combustible, and other waste materials; stabilizing backfilled materials; and using waste material for fill--(1) Cover. All exposed coal seams remaining after mining and any acid-forming, toxic-forming, combustible materials, or any other waste materials identified by the regulatory authority that are exposed, used, or produced during mining shall be covered with a minimum of 4 feet of nontoxic and noncombustible material; or, if necessary, treated to neutralize toxicity in order to prevent water pollution and sustained combustion, and to minimize adverse effects on plant growth and land uses. Where necessary to protect against upward migration of salts, exposure by erosion, to provide an adequate depth for plant growth, or to otherwise meet local conditions, the regulatory authority shall specify thicker amounts of cover using nontoxic material. Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution or otherwise violate the provisions of § 715.17 of this part.

(2) Stabilization. Backfilled materials shall be selectively placed and compacted wherever necessary to prevent leaching of toxic-forming materials into surface or subsurface waters in accordance with § 715.17 and wherever necessary to ensure the stability of the backfilled materials.

The method of compacting material and the design specifications shall be approved by the regulatory authority before the toxic materials are covered. [* * *]
HISTORY: [*42 FR 62680,* Dec. 13, 1977; *43 FR 2721,* Jan. 19, 1978, as amended at *47 FR 18553,* Apr. 29, 1982]
AUTHORITY: Pub. L. 95-87 *(30 U.S.C. 1201* et seq.).

30 CFR 715.17; § 715.17 Protection of the hydrologic system.

The permittee shall plan and conduct coal mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from surface coal mining and reclamation operations, both on- and off-site. Changes in water quality and quantity, in the depth to ground water, and in the location of surface water drainage channels shall be minimized such that the postmining land use of the disturbed land is not adversely affected and applicable Federal and State statutes and regulations are not violated. The permittee shall conduct operations so as to minimize water pollution and shall, where necessary, use treatment methods to control water pollution. The permittee shall emphasize surface coal mining and reclamation practices that will prevent or minimize water pollution and changes in flows in preference to the use of water treatment facilities. Practices to control and minimize pollution include, but are not limited to, stabilizing disturbed areas through grading, diverting runoff, achieving quick growing stands of temporary vegetation, lining drainage channels with rock or vegetation, mulching, sealing acid-forming and toxic-forming materials, and selectively placing waste materials in backfill areas. If pollution can be controlled only by treatment, the permittee shall operate and maintain the necessary water-treatment facilities for as long as treatment is required. [* * *]

(g) Acid and toxic materials. Drainage from acid-forming and toxic-forming mine waste materials and soils into ground and surface water shall be avoided by--

(1) Identifying, burying, and treating where necessary, spoil or other materials that, in the judgment of the regulatory authority, will be toxic to vegetation or that will adversely affect water quality if not treated or buried. Such material shall be disposed of in accordance with the provision of § 715.14(j);

(2) Preventing or removing water from contact with toxic-producing deposits;

(3) Burying or otherwise treating all toxic or harmful materials within 30 days, if such materials are subject to wind and water erosion, or within a lesser period designated by the regulatory authority. If storage of such materials is approved, the materials shall be placed on impermeable material and protected from erosion and contact with surface water. Coal waste ponds and other coal waste materials shall be maintained according to paragraph (g)(4) of this section, and § 715.18 shall apply;

(4) Burying or otherwise treating waste materials from coal preparation plants no later than 90 days after the cessation of the filling of the disposal area. Burial or treatment shall be in accordance with § 715.14(j);

(5) Casing, sealing or otherwise managing boreholes, shafts, wells, and auger holes or other more or less horizontal holes to prevent pollution of surface or ground water and to prevent mixing of ground waters of significantly different quality. All boreholes that are within the permit area but are outside the surface coal mining area or which extend beneath the coal to be mined and into water bearing strata shall be plugged permanently in a manner approved by the regulatory authority, unless the boreholes have been approved for use in monitoring; (6) Taking such other actions as required by the regulatory authority.

(h) Ground water--(1) Recharge capacity of reclaimed lands. The disturbed area shall be reclaimed to restore

approximate premining recharge capacity through restoration of the capability of the reclaimed areas as a whole to transmit water to the ground water system. The recharge capacity should be restored to support the approved postmining land use and to minimize disturbances to the prevailing hydrologic balance at the mined area and in associated offsite areas. The permittee shall be responsible for monitoring according to paragraph (h)(3) of this section to ensure operations conform to this requirement.

(2) Ground water systems. Backfilled materials shall be placed to minimize adverse effects on ground water flow and quality, to minimize offsite effects, and to support the approved postmining land use. The permittee shall be responsible for performing monitoring according to paragraph (h)(3) of this section to ensure operations conform to this requirement.

(3) Monitoring. Ground water levels, infiltration rates, subsurface flow and storage characteristics, and the quality of ground water shall be monitored in a manner approved by the regulatory authority to determine the effects of surface coal mining and reclamation operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in ground water systems at the mine area and in associated offsite areas. When operations are conducted in such a manner that may affect the ground water system, ground water levels and ground water quality shall be periodically monitored using wells that can adequately reflect changes in ground water quantity and quality resulting from such operations. Sufficient water wells must be used by the permittee. The regulatory authority may require drilling and development of additional wells if needed to adequately monitor the ground water system. As specified and approved by the regulatory authority, additional hydrologic tests, such as infiltration tests and aquifer tests, must be undertaken by the permittee to demonstrate compliance with paragraph (h)(1) and (2) of this section.[* * *]

HISTORY: [*42 FR 62680,* Dec. 13, 1977; *43 FR 2721,* Jan. 19, 1978; *43 FR 3705,* Jan. 27, 1978, as amended at *43 FR 8091,* Feb. 27, 1978; *43 FR 21458,* May 18, 1978; *44 FR 30631,* May 25, 1979; *44 FR 36887,* June 22, 1979; *44 FR 77451,* Dec. 31, 1979; *45 FR 6913,* Jan. 30, 1980]
AUTHORITY: (Secs. 101, 102, 201, 501, 503-510, 515-517, 523, and 701, Surface Mining Act of 1977, Pub. L. 95-87), *30 U.S.C. 1201,* 1202, 1211, 1251-1260, 1265-1267, 1273, 1291))

30 CFR 780.21; § 780.21 Hydrologic information. [* * *]

(e) Alternative water source information. If the PHC determination required by paragraph (f) of this section indicates that the proposed mining operation may proximately result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial or other legitimate purpose, then the application shall contain information on water availability and alternative water sources, including the suitability of alternative water sources for existing permining uses and approved postmining land uses. [* * *]
HISTORY: [*48 FR 43985,* Sept. 26, 1983, as amended at *53 FR 36400,* Sept. 19, 1988]
AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: *30 U.S.C. 1201* et seq. and *16 U.S.C. 470* et seq.

30 CFR 816.41; § 816.41 Hydrologic-balance protection.

(a) General. All surface mining and reclamation activities shall be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water rights, and to support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this part. The regulatory authority

may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented. Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment.

(b) Ground-water protection. In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under § 780.21(h) of this chapter and the following:

(1) Ground-water quality shall be protected by handling earth materials and runoff in a manner that minimizes acidic, toxic, or other harmful infiltration to ground-water systems and by managing excavations and other disturbances to prevent or control the discharge of pollutants into the ground water.

(2) Ground-water quantity shall be protected by handling earth materials and runoff in a manner that will restore the approximate premining recharge capacity of the reclaimed area as a whole, excluding coal mine waste disposal areas and fills, so as to allow the movement of water to the ground-water system.[* * *]

(d) Surface-water protection. In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under § 780.21(h) of this chapter, and the following:

(1) Surface-water quality shall be protected by handling earth materials, ground-water discharges, and runoff in a manner that minimizes the formation of acidic or toxic drainage; prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution. If drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the

necessary water-treatment facilities or water quality controls.

(2) Surface-water quality and flow rates shall be protected by handling earth materials and runoff in accordance with the steps outlined in the plan approved under § 780.21(h) of this chapter.[* * *]

HISTORY: [*48 FR 43990*, Sept. 26, 1983]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: *30 U.S.C. 1201* et seq.; and sec. 115 of Pub. L. 98-146.

30 CFR 843.12; § 843.12 Notices of violation.

(a)(1) An authorized representative of the Secretary shall issue a notice of violation if, on the basis of a Federal inspection carried out during the enforcement of a Federal program or Federal lands program or during Federal enforcement of a State program under section 504(b) or 521(b) of the Act and part 733 of this chapter, he finds a violation of the Act, this chapter, the applicable program or any condition of a permit or an exploration approval imposed under such program, the Act, or this Chapter, which does not create an imminent danger or harm for which a cessation order must be issued under § 843.11.

(2) When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under § 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that appropriate action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, subject to the procedures of § 842.11(b)(1)(iii) of this

chapter, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. No additional notification to the State by the Office is required before the issuance of a notice of violation if previous notification was given under § 842.11(b)(1)(ii)(B) of this chapter.

(b) A notice of violation issued under this section shall be in writing signed by the authorized representative who issues it, and shall set forth with reasonable specificity:

(1) The nature of the violation;

(2) The remedial action required, which may include interim steps;

(3) A reasonable time for abatement, which may include time for accomplishment of interim steps; and

(4) A reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies. [* * *]

HISTORY: [*47 FR 35637,* Aug. 16, 1982, as amended at *53 FR 26744,* July 14, 1988]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: *30 U.S.C. 1201* et seq.

40 CFR 434.10; § 434.10 Applicability.

This part applies to discharges from any coal mine at which the extraction of coal is taking place or is planned to be undertaken and to coal preparation plants and associated areas. HISTORY: *50 FR 41305,* Oct. 9, 1985.

AUTHORITY: *33 U.S.C. 1311* 1314(b), (c), (e), and (g), 1316(b) and (c), 1317(b) and (c), and 1361.

40 CFR 434.30; § 434.30 Applicability; description of the acid or ferruginous mine drainage subcategory.

The provisions of this subpart are applicable to acid or ferruginous mine drainage from an active mining area resulting from the mining of coal of any rank including, but not limited to, bituminous, lignite, and anthracite.

HISTORY: *50 FR 41305,* Oct. 9, 1985.
AUTHORITY: *33 U.S.C. 1311* 1314(b), (c), (e), and (g), 1316(b) and (c), 1317(b) and (c), and 1361.

40 CFR 434.31 § 434.31 [Reserved]

[NO TEXT IN ORIGINAL]

HISTORY: Source: *50 FR 41305,* Oct. 9, 1985.
AUTHORITY: *33 U.S.C. 1311* 1314(b), (c), (e), and (g), 1316(b) and (c), 1317(b) and (c), and 1361.

40 CFR 434.32; § 434.32 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT).

Except as provided in 40 CFR 125.30-125.32, 40 CFR 401.17, and §§ 434.61, 434.62 and 434.63 of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

	BPT Effluent Limitations	
Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Concentration in mg/l	
Iron, total	7.0	3.5
Manganese, total	4.0	2.0
TSS	70.0	35.0
pH	(n1)	(n1)

n1 Within the range 6.0 to 9.0 at all times.

HISTORY: *50 FR 41305,* Oct. 9, 1985.

AUTHORITY: *33 U.S.C. 1311* 1314(b), (c), (e), and (g), 1316(b) and (c), 1317(b) and (c), and 1361.

40 CFR 434.33; § 434.33 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

Except as provided in 40 CFR 125.30-125.32, 40 CFR 401.17, and §§ 434.61, 434.62 and 434.63 of this part, the following limitations establish the concentration or quality of pollutants which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

BPT Effluent Limitations		
Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Concentration in mg/l	
Iron, total	7.0	3.5
Manganese, total	4.0	2.0

HISTORY: *50 FR 41305,* Oct. 9, 1985.
AUTHORITY: *33 U.S.C. 1311* 1314(b), (c), (e), and (g), 1316(b) and (c), 1317(b) and (c), and 1361.

40 CFR 434.34; § 434.34 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]

[NO TEXT IN ORIGINAL]
HISTORY: Source: *50 FR 41305,* Oct. 9, 1985.

AUTHORITY: *33 U.S.C. 1311* 1314(b), (c), (e), and (g), 1316(b) and (c), 1317(b) and (c), and 1361.

40 CFR 434.35; § 434.35 New source performance standards (NSPS).

Except as provided in 40 CFR 401.17, and §§ 434.61, 434.62 and 434.63 of this part, the following new source performance standards shall be achieved for any discharge from a new source subject to this subpart:

	NSPS Effluent Limitations	
Pollutant or pollutant property	Maximum for any 1 day	Average of daily values for 30 consecutive days
	Concentration in mg/l	
Iron, total	6.0	3.0
Manganese, total	4.0	2.0
TSS	70.0	35.0
pH	(n1)	(n1)

n1 Within the range 6.0 to 9.0 at all times.

HISTORY: *50 FR 41305,* Oct. 9, 1985.
AUTHORITY: *33 U.S.C. 1311* 1314(b), (c), (e), and (g), 1316(b) and (c), 1317(b) and (c), and 1361.

Appendix K -- Memorandum In Support of Plaintiff's Motion To Reconsider And Alter Or Amend Judgment, Dated and Served July 9, 1999

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

RITH ENERGY, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 92-480 L
	)	Judge John P. Wiese
THE UNITED STATES,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER AND ALTER OR AMEND JUDGMENT

INTRODUCTION

Plaintiff Rith Energy, Inc. (Rith) respectfully submits this memorandum in support of its motion pursuant to RCFC 59.

In its June 25, 1999 decision (at pp. 11-12), this Court ruled that the high probability of acid mine drainage ("AMD") into the Sewanee aquifer underground was a nuisance in violation of State law. The Court also rejected Rith's argument that it received a National Pollutant Discharge Elimination System ("NPDES") permit from the State, reasoning that:

> "The information plaintiff submitted to the state officials no more informed them of the high

> probability of harm to the Sewanee aquifer than did that same data when presented to the federal officials. We can justifiably assume, however, that even as the federal officials were persuaded to reexamine the validity of the permit they initially had issued, so too would the state officials. A high probability of pollution of an aquifer is not within the tolerances of either regulatory scheme -- the Tennessee Water Quality Control Act or SMCRA." [id.].

In prior proceedings, we understood the government to have argued only that surface discharges of AMD were a nuisance under state law. See Defendant's Memorandum In Support Of Its Motion For Summary Judgment, served November 15, 1996, pp. 46-49. Because we did not understand the government to have argued that underground seepage of AMD was a nuisance, we did not address that specific issue in our earlier filings. Accordingly, we do so here.

NPDES PERMIT

1. As indicated in the attached declarations of T.C. Miller and William Ring (P.Ex. 65-66), Rith made full disclosure of all information requested when applying for its NPDES permit from the State. The State's permit application (P.Ex. 14) did not inquire into soil overburden samples, or iron or manganese in the underground water, and called for no information about those subjects. Further, the NPDES permit actually issued by the State (P.Ex. 67, p. 3)[1] imposed various specific requirements for surface discharges, but contained no

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[1] P.Ex. 67 is the complete NPDES permit Rith received from Tennessee. Plaintiff's earlier filed P.Ex. 21 contained only the first page of the permit.

limitations or requirements regarding underground water.[2] In 1987, after the Office of Surface Mining ("OSM") had suspended Rith's permit based on its post-permit issuance discovery of increased acidity in the Sewanee overburden, a State official visited Rith's site to examine citizen complaints regarding the surface and groundwater. P.Ex. 65, ¶ 25, and P. Ex. 40, pp. 2157, 2159. He made no recommendations regarding any aspect of Rith's NPDES permit. These facts are inconsistent with the view that, if the State of Tennessee had learned about the increased acidity of the overburden, it would have revoked or modified Rith's NPDES permit. Further, the Clean Water Act, 33 U.S.C. §§ 1342(a)(1), (c)(2), and (k), provides that compliance with an NPDES permit shall be deemed compliance with relevant provisions of that Act. See, e.g., Sierra Club v. United States Environmental Protection Agency, 995 F.2d 1478, 1485-86 (9th Cir. 1993).

[* * *]

July 9, 1999

Respectfully submitted,

/s/
RAYMOND D. BATTOCCHI
Attorney of Record [* * *]

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[2] There are important practical differences between surface discharges and underground seepage. Surface discharges can be readily tested by taking water samples at the source points of discharge. The water samples will show whether the discharges are, or are not, in compliance with the effluent limitations in the NPDES permit. Underground seepage can occur anywhere in or near a coal seam, and occur deep underground. Even if underground wells are drilled, it is difficult to determine whether the well water comes from the mine or another source.

Appendix L – – Order, United States Court of Appeals for the Federal Circuit, Dated and Filed November 5, 2001

United States Court of Appeals for the Federal Circuit

99-5153

RITH ENERGY, INC.,
Plaintiff-Appellant,
v.
UNITED STATES,
Defendant-Appellee.

ORDER

A combined petition for panel rehearing and rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED* and it is further

ORDERED that the petition for rehearing en banc be, and same hereby is, DENIED.

[* * *].

Dated: November 5, 2001

FOR THE COURT

/s/

Jan Horbaly, Clerk

FILED US. COURT OF APPEALS FOR THE FEDERAL CIRCUIT NOV – 5 2001

* The merits panel issues a precedential opinion simultaneously.
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